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THE

LAWS OF ENGLAND.

VOLUME XVII.

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THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895—1905,

AND OTHER LAWYERS.

VOLUME XVII.

INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES.
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INJUNCTION.
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Bankruptcy - - - ,, BANKRUPTCY AND INSOLVENCY.
Contempt of Court - - ,, CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL; EXECUTION.
Damages - - - ,, DAMAGES.
Discovery - - - ,, DISCOVERY, INSPECTION, AND INTERROGATORIES.
Equitable Jurisdiction, Growth of - - - ,, EQUITY.
Estoppel - - - ,, ESTOPPEL.
Execution - - - ,, EXECUTION.
Insolvency - - - ,, BANKRUPTCY AND INSOLVENCY.
Inspection - - - ,, DISCOVERY, INSPECTION, AND INTERROGATORIES.
Interpleader in Mayor's Court - - - ,, MAYOR'S COURT, LONDON.
Interrogatories - - ,, DISCOVERY, INSPECTION, AND INTERROGATORIES.
Landlord's Claim on Bankruptcy - - - ,, BANKRUPTCY AND INSOLVENCY; DISTRESS; EXECUTION.
Mortgagee - - - ,, MORTGAGE.
Official Receiver - - ,, BANKRUPTCY AND INSOLVENCY.
Official Referee - - ,, ARBITRATION.
Partnership Property - ,, PARTNERSHIP.
Payment into Court - - ,, COUNTY COURTS; PRACTICE AND PROCEDURE.
Receiver - - - - ,, RECEIVERS.
Receiving Order - - ,, BANKRUPTCY AND INSOLVENCY.
Rent - - - - ,, DISTRESS; LANDLORD AND TENANT.
Sheriffs and Officers - ,, EXECUTION; SHERIFFS AND BAILIFFS.
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Trustee - - - - ,, BANKRUPTCY AND INSOLVENCY; TRUSTS AND TRUSTEES.
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INTERPRETATION OF DOCUMENTS.

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INTERREGNUM.

See CONSTITUTIONAL LAW.

INTERROGATORIES.

See DISCOVERY, INSPECTION, AND INTERROGATORIES.

INTERVENTION.

See HUSBAND AND WIFE.

INTESTACY.

See DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) ..	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen. .. .	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com.	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	Sir J. Brooke's Abridgment
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. A.	Court of Criminal Appeal
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. *temp.* Finch ..	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680
Cas. *temp.* King ..	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733
Cas. *temp.* Talb... ..	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)
Ch. App...	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. ..	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst.	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid.	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895—(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg... ..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. *temp.* Brough. ..	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834
Coop. *temp.* Cott. ..	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1909 (current)
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Craw. & D. Abr. C. ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas. ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas. ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	Dalrymple's Decisions, Court of Session (Scotland) fol., 1 vol., 1698—1720
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench 1 vol., 1843—1844
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol. 1852—1856
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832
De G.	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848
De G. F. & J.	De Gex, Fisher, and Jones's Reports, Chancery, 4 vols., 1859—1862
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859
De G. J. & Sm... ..	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports, Chancery, 8 vols., 1851—1857
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798
Dig.	Justinian's Digest or Pandects
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776
Doug. (K. B.)	Douglas' Reports, King's Bench, 4 vols., 1778—1785
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849

Dow. & Ry. (K. B.)	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.)	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.)	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1839
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INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES.

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Part I.—Introductory.

SECT. 1.—*Nature and Origin.*

SECT. 1. Nature and Origin.

1. Industrial and provident societies are often termed co-operative societies, and are societies formed to carry on industries, trades, or businesses in a manner authorised by their rules (*a*).

Nature.

The earliest of the existing co-operative societies, such as the Rochdale Equitable Pioneers, established in 1844, were distributive stores (*b*), and were registered under the Friendly Societies Acts, 1834 and 1846 (*c*). But in 1852 (*d*), the first Act relating exclusively to industrial and provident societies was passed, though the societies registered under it were still made subject to certain provisions contained in the Acts relating to friendly societies. Various amending and consolidating statutes followed (*e*), including the Industrial and Provident Societies Act, 1862 (*f*), which incorporated societies registered under its provisions. In 1876 an Act (*g*) was passed repealing the previous Acts, and assimilating the law relating to industrial and provident societies to that relating to friendly societies. The corporate character, however, of the former class of society remained unimpaired, one of the main distinctions between a registered industrial and provident society and a registered friendly society being that the former is always, and the latter never, a corporate body (*h*). The Act of 1876 (*g*) was in turn repealed by the Industrial and Provident Societies Act, 1893 (*i*), and that statute (hereafter, in this title, referred to as "the Act"), as amended in 1894 (*k*) and 1895 (*l*), regulates all existing registered industrial and provident societies.

Legislation.

"The Act."

(*a*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 4.

(*b*) See Holyoake's History of Co-operation in England; Encyclopædia of Forms and Precedents, Vol. X., pp. 203, 204; Davis on Industrial and Provident Societies (ed. 1869), p. 2. Some idea of the present extent of the co-operative movement may be gathered from the fact that in 1909 the number of registered co-operative societies of the ordinary distributive and productive type in Great Britain and Ireland, and making returns, was 2,331, with a total membership of 2,613,142, and share capital of £34,841,982, while the amount due to creditors and depositors was £16,734,754. Besides these there were 497 societies for carrying on businesses of various kinds, and 282 land societies. And see *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102.

(*c*) 4 & 5 Will. 4, c. 40; 9 & 10 Vict. c. 27 (both repealed). As to the status of unregistered societies generally, see title FRIENDLY SOCIETIES, Vol. XV., p. 127.

(*d*) Industrial and Provident Societies Act, 1852 (15 & 16 Vict. c. 31).

(*e*) Industrial and Provident Societies Acts, 1854 (17 & 18 Vict. c. 25); 1856 (19 & 20 Vict. c. 40); 1862 (25 & 26 Vict. c. 87); 1867 (30 & 31 Vict. c. 117); 1871 (34 & 35 Vict. c. 80).

(*f*) 25 & 26 Vict. c. 87.

(*g*) Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45).

(*h*) Throughout this title the expression "registered society" is used in reference to societies registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39). See also *ibid.*, s. 79.

(*i*) 56 & 57 Vict. c. 39.

(*k*) Industrial and Provident Societies Act, 1894 (57 & 58 Vict. c. 8). This Act refers only to the island of Jersey.

(*l*) Industrial and Provident Societies (Amendment) Act, 1895 (58 & 59 Vict. c. 30); see p. 10, *post*.

SECT. 1. Nature and Origin.

Registered societies have not, under the Act (*m*), the privileges extended to registered friendly societies of exemption from stamp duty (*n*).

No privilege as to stamp duty.

SECT. 2.—*Classes of Societies.*

SUB-SECT. 1.—*In General.*

Societies which may be registered.

2. Societies carrying on any wholesale or retail industries, businesses (*o*), or trades specified in their rules, including dealings of any description with land (*p*), may be registered as industrial and provident societies (*q*). They fall generally into two classes : (1) productive, and (2) distributive (*r*). The former comprises societies where the labour of the members is contributed to a common object. The latter comprises those societies whose object it is to procure goods at wholesale prices, and distribute them at a little over cost price to members (*s*). The latter class may also be registered for other purposes, such as banking (*t*).

Classes.

SUB-SECT. 2.—*Banking Societies.*

Special statutory provisions.

3. In regard to the business of banking (*u*), registered societies are subject to special provisions (*a*). Thus, no registered society

(*m*) 56 & 57 Vict. c. 39. The earliest industrial and provident societies which were registered under the Friendly Societies Acts enjoyed this exemption.

(*n*) See title FRIENDLY SOCIETIES, Vol. XV., p. 161.

(*o*) As to meaning of "business" for the purpose of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), see *Re Bristol Athenæum* (1889), 43 Ch. D. 236.

(*p*) "Land" includes hereditaments and chattels real of whatever description (Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 69), s. 39). Dealings of any description with land are permitted (*ibid.*, s. 4). As to dealings with land, see *ibid.*, s. 36. Under the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), any number of persons, not being less than seven, were empowered to establish a society to be registered for the purpose of carrying on any labour, trade, or handicraft, whether wholesale or retail, except the business of banking, and of applying the profits for any purpose allowed by the Friendly Societies Acts. This was followed by the Industrial and Provident Societies Act, 1871 (34 & 35 Vict. c. 80), which provided that the buying and selling of land should be deemed a trade within the meaning of the earlier Act.

(*q*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 4.

(*r*) See, *e.g.*, Report of Chief Registrar, 1907, p. 34.

(*s*) Distributive societies were brought under the Friendly Societies Act, 1846 (9 & 10 Vict. c. 27), by the "frugal investment" clause of that Act. The well-known Army and Navy Co-operative Society, Ltd., is registered under the Companies Acts, as to which Acts see, generally, title COMPANIES, Vol. V. See also Encyclopædia of Forms and Precedents, Vol. X., p. 203.

(*t*) Among the miscellaneous societies registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), in 1899, were eleven working men's clubs, three land societies, one co-operative bank, one labour exchange association, one agricultural organisation society, and one hotel assistants employment society; four agricultural and creamery societies were registered, and eighteen other productive societies (Report of Chief Registrar, 1899, p. 27).

(*u*) As to meaning of the expression "business of banking," see *Re Bottomgate Industrial Co-operative Society* (1891), 65 L. T. 712, 714 ; and Report of Chief Registrar, 1906, pp. 10, 35.

(*a*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 4 (b).

which has any withdrawable share capital may carry on the business of banking (*b*).

The business of banking, however, for the purposes of the Act (*c*), does not include (1) the taking of deposits of not more than 10*s.* in any one payment, or (2) the taking of a deposit of not more than £20 for any one depositor, payable on not less than two clear days' notice (*d*). But no society which takes such deposits may make any payment of withdrawable capital, while any claim due on account of any such deposit is unsatisfied (*e*).

Business of banking.

A rule purporting to secure as a first charge on the society's assets deposit loans which are invalid because the society is not authorised to carry on a banking business, has no effect, and in a winding-up confers no priority upon the lenders as against creditors existing at the date of the rule (*f*).

Effect of invalid rule.

4. A registered society carrying on the business of banking must, on the first Mondays in February and August in every year, make out a formal statement of the capital of the society, its liabilities on the first day of January or July last previous, and its assets on the same date (*g*), and keep it conspicuously hung up in its registered office, and in every other office or place of business where the banking business is carried on (*h*).

Annual statements.

5. A society registered under the Industrial and Provident Societies Act, 1893 (*i*), ostensibly for the carrying on of banking, which is in fact carrying on the business of money-lending, should, it appears, also be registered under the Money-lenders Act, 1900 (*k*).

Effect of Money-lenders Act.

SUB-SECT. 3.—*Building and Land Societies.*

6. Societies of the nature of building societies may be registered under the Act (*l*). Such societies are usually known as co-operative building societies, or co-operative land societies. Sometimes land societies and building societies are established to carry out joint operations under the same management, the land society purchasing

Co-operative building and land societies.

(*b*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 19 (1).
(*c*) 56 & 57 Vict. c. 39.
(*d*) *Ibid.*, s. 19 (3).
(*e*) *Ibid.* The penalty for breach of these provisions is £5 (*ibid.*, s. 68).
(*f*) *Re Bottomgate Industrial Co-operative Society* (1891), 65 L. T. 712.
(*g*) For the statutory form which must be used, see Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. III.
(*h*) *Ibid.*, s. 19 (2); compare the similar statement which has to be made by a banking company under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 108, Sched. I., Form C; and see titles BANKERS AND BANKING, Vol. I., p. 583; COMPANIES, Vol. V., pp. 44, 612 *et seq.*
(*i*) 56 & 57 Vict. c. 39.
(*k*) 63 & 64 Vict. c. 51. See *ibid.*, s. 6; and title MONEY AND MONEY-LENDING.
(*l*) 56 & 57 Vict. c. 39, s. 4. Formerly this was not the case; see *Re No. 3 Midland Counties Benefit Building Society* (1864), 33 L. J. (CH.) 739, C. A. Some ordinary building societies also term themselves co-operative building societies. See *Cross* v. *Fisher*, [1892] 1 Q. B. 467, C. A., *per* Lord HALSBURY, L.C., at p. 474. Land societies may also be established by deeds of settlement or as joint stock companies; as to the necessity for registration of mutual land societies, see title COMPANIES, Vol. V., pp. 44, 45, 765.

SECT. 2. Classes of Societies.

the land and the building society advancing the money for the erection of buildings.

Distinguished from ordinary building societies.

A co-operative building society registered under the Act (*m*) has certain advantages over a society registered under the Building Societies Acts (*n*). It may, for example, buy and sell land to any extent (*o*). On the other hand, it is subject to certain conditions imposed by the Act (*m*) not applicable to an ordinary building society, *e.g.*, the addition of the word "limited" after its name, the restriction of individual members to an interest of £200 in the society's funds, and the provisions as to withdrawable capital.

Objects.

A co-operative building society or land society is a society which buys lands with the funds contributed by its members, and divides the lands among the members (*p*) after laying out the property in lots, with the necessary roads. The price of the various lots is determined by an equitable apportionment of the total sum expended by the society on the property in question. The lots are distributed amongst the members either by priority of application or by ballot, or in other ways provided by the rules (*q*). If the purchasing member pays for the property outright, he gets a conveyance; if he prefers to pay by instalments the lot remains on the society's books until the whole price is paid.

Position of allottees.

7. It is important for an allottee purchasing from the directors or trustees of a land society which is not a registered society to examine into the title of the vendors (*r*). He is, for example, bound by restrictive covenants entered into by the trustees of the land society (*s*). An allottee has apparently a vested equitable interest in his allotment until the conveyance is executed (*t*).

Dwellings for working classes.

8. A county council may promote the formation or extension of co-operative societies having for their object, or one of their objects, the erection or improvement of dwellings for the working classes (*u*); and may assist such societies, with the consent of the Local Government Board, by making grants or advances to them, or by guaranteeing advances (*v*).

(*m*) 56 & 57 Vict. c. 39.

(*n*) As to which, see title BUILDING SOCIETIES, Vol. III., pp. 321 *et seq.*

(*o*) See title BUILDING SOCIETIES, Vol. III., pp. 378, 379.

(*p*) Thus differing from building societies; see *Grimes* v. *Harrison* (1859), 26 Beav. 435, 441. As to building societies generally, see title BUILDING SOCIETIES, Vol. III., pp. 321—400, and as to the distinction between building societies and freehold land societies, see *ibid.*, p. 379, note (*b*). Much attention has recently been given by co-operative societies to the subject of housing, many societies having purchased estates and erected dwellings for their members to acquire upon reasonable terms (Report of Chief Registrar, 1907, p. 35).

(*q*) Distribution by ballot is not illegal as a lottery (*Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; see title GAMING AND WAGERING, Vol. XV., pp. 299 *et seq.*

(*r*) *Peto* v. *Hammond* (1861), 31 L. J. (CH.) 354.

(*s*) *Catt* v. *Tourle* (1869), 4 Ch. App. 654; *Eastwood* v. *Lever* (1863), 33 L. J. (CH.) 355, C. A. See generally as to restrictive covenants, titles LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*t*) *R.* v. *Carlton* (*Inhabitants*) (1849), 14 Q. B. 110; see *Entwistle* v. *Davis* (1867), L. R. 4 Eq. 272.

(*u*) Housing, Town Planning etc. Act, 1909 (9 Edw. 7, c. 44), s. 72 (1).

(*v*) *Ibid.*, s. 72 (2); see also *ibid.*, s. 4, and Housing of the Working Classes

SECT. 2. Classes of Societies.

Small holdings and allotments.

9. A county council, or the council of a county borough, may, with the consent of the Board of Agriculture and Fisheries (*w*), let one or more small holdings to any association (*a*) formed for the purposes of creating or promoting the creation of small holdings or allotments, and the council of a borough, urban district or parish has a similar power with regard to allotments (*b*).

SECT. 3.—*Existing Societies constituted under Repealed Acts.*

Existing societies.

10. Existing incorporated societies registered or certified under any repealed statute (*c*) are regarded as societies registered under the Act (*d*). Their rules, so far as they are not contrary to any express provision of the Act, continue in force until altered or rescinded (*e*).

SECT. 4.—*Conversion of Company into Society.*

Conversion of company.

11. A company registered under the Companies Acts, 1862—1908 (*f*), may, by a special resolution, determine to convert itself into a registered society (*g*).

The resolution must appoint seven members of the company to sign the rules, which must also be signed by the secretary of the society, and it may either authorise the seven members to accept any alterations made in the rules by the registrar (*h*), or may require them to lay such alterations before a general meeting of the company

Act, 1890 (53 & 54 Vict. c. 70), s. 67; see further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*w*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 9 (2) (b).

(*a*) The Act does not define the expression "association," but probably the lettings will be confined to societies registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39); see Encyclopædia of Forms and Precedents, Vol. XVI., p. 37, note (r). As to small holdings generally, see title SMALL HOLDINGS AND SMALL DWELLINGS.

(*b*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), ss. 9, 27 (6). As to the working of societies established under the Allotments Acts, see Report of Chief Registrar, 1907, p. 9; as to special rules required, see p. 12, *post*. For form of agreement to let allotments to an association, see Encyclopædia of Forms and Precedents, Vol. XVI., pp. 37—40. As to allotments generally, see title ALLOTMENTS, Vol. I., pp. 331 *et seq.*; Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36).

(*c*) Compare the Industrial and Provident Societies Acts, 1862 (25 & 26 Vict. c. 87); 1867 (30 & 31 Vict. c. 117); 1876 (39 & 40 Vict. c. 45).

(*d*) 56 & 57 Vict. c. 39.

(*e*) *I bid.*, s. 3.

(*f*) See title COMPANIES, Vol. V., pp. 33 *et seq.*

(*g*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 55 (1). The principal differences between a joint stock company and an industrial and provident society are as follows:—(a) The capital of a company is fixed by its memorandum of association. The capital of a society varies. It is increased by accumulations, and, if withdrawals are allowed, correspondingly diminished. (b) There is no statutory limit to the interest a shareholder may have in a company. In a society the statutory limit of an individual member's interest is £200. (c) The special statutory privileges given to societies, *e.g.*, payment to nominees on death, transfer of stock by registrar, discharge of mortgages by indorsed receipt etc., are not enjoyed by companies. (d) The cost of establishing a society is less than that of a company.

(*h*) As to the registrar, see p. 8, *post*.

SECT. 4. Conversion of Company into Society.

for acceptance (*i*). If the nominal value of shares in the company held by any member, other than a registered society, exceeds £200, the resolution may provide for the conversion of such excess into a transferable loan stock, and for repayment with interest (*j*).

A copy of the rules and resolution must be sent to the registrar. If he approves, he gives an acknowledgment of registry (*k*) and a certificate that the rules have been registered (*l*). A sealed copy of the resolution, with the certificate, must then be sent to the registrar of joint stock companies for registration. On registration by him the conversion takes effect (*m*), and the previous registry of the company as such is cancelled. Registration of a company as a registered society does not affect any prior right or claim against the company for the time being subsisting, and the company may be sued as if it had not been registered as a society (*n*).

SECT. 5.—*Authorities for administering the Act.*

The Treasury.

12. Various powers are reposed in the Treasury (*o*) relating to the administration of the Act (*p*). In certain circumstances the cancellation or suspension of the registry of a society by the registrar is subject to the approval of the Treasury (*a*). The Treasury also has power to make regulations respecting registry and procedure under the Act (*b*).

The Registry or Central Office.

The officers. The registrar.

13. The functions and powers of the Registrar of Industrial and Provident Societies in England are vested in the Central Office of the Registry of Friendly Societies. The Chief Registrar and the assistant registrars of friendly societies for England constitute the Central Office (*c*).

The registrar is one of the channels through which the State exercises control over industrial and provident societies, the other channel being the Treasury. In the case of registered societies the

(*i*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 55 (2).

(*j*) *Ibid.*, s. 55 (1). No member, other than a registered society, may hold any interest in the shares of a society exceeding £200 (*ibid.*, s. 4 (a)).

(*k*) As to acknowledgment of registry, see p. 10, *post*.

(*l*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 55 (3).

(*m*) *Ibid.*, s. 55 (4)

(*n*) *Ibid.*, s. 55 (5).

(*o*) See title CONSTITUTIONAL LAW, Vol. VII., p. 100.

(*p*) 56 & 57 Vict. c. 39, ss. 27 (2), 49 (2), 50 (1), 59, 71, 72, 73; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 192; and pp. 29, 30, 37, *post*.

(*a*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 9 (1) (c), (2); see p. 37, *post*.

(*b*) 56 & 57 Vict. c. 39, s. 74. As to the limits of the powers of the Treasury to make such regulations, see *Wilmot* v. *Grace*, [1892] 1 Q. B. 812. Under these powers regulations were made in 1894. These regulations, which are referred to throughout this title as "Treas. Reg. 1894," and are printed in Statutory Rules and Orders Revised to 31st December, 1903, Vol. VI., Industrial and Provident Society, pp. 1 *et seq.*, were substituted for those previously made in 1876 under the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), which were thereby rescinded.

(*c*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 76, 79; Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 1—4. As to the constitution of the Central Office, see title FRIENDLY SOCIETIES, Vol. XV., p. 129.

registrar issues acknowledgments of registry (*d*), registers rules and alterations of rules (*e*), and situation of office or change of office (*f*), prescribes the form of and receives the annual accounts and statements (*g*), possesses powers of inspecting (*h*) and dissolving societies (*i*), of suspending and cancelling registry (*k*), and of deciding disputes in certain circumstances (*l*), and is charged with the duty of laying before Parliament an annual report of the accounts of all societies and the proceedings of the registry (*m*).

SECT. 5. Authorities for administering the Act.

Part II.—Registration.

14. No industrial and provident society can be registered unless it consists of seven persons at least (*n*), nor can it be registered under a name so nearly resembling the name of another registered society as to be likely, nor in any name likely, in the opinion of the registrar, to mislead the public as to its identity (*o*). The word "limited" must be the last word in the name (*p*).

Requisite membership.

Name.

A society registered under the Industrial and Provident Societies Act, 1852 (*q*), and not under the Industrial and Provident Societies Acts, 1862 (*r*), 1867 (*s*), or 1876 (*t*), may obtain from the registrar an acknowledgment of registry under the Act (*u*).

15. A society carrying on business in more than one part of the United Kingdom must be registered in the part in which its registered office is situated. But copies of the rules of the society and all amendments of the same must, when registered, be sent to the registrar of each of the other parts to be recorded. Until the rules are recorded in each part the society is not entitled to the statutory privileges in such part. Amendments of rules are ineffective in a part where they are not recorded (*a*).

Society carrying on business in more than one part of the United Kingdom.

(*d*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 6; see p. 10, *post*.
(*e*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 5 (2), 10; see p. 10, *post*.
(*f*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 11; see p. 14, *post*.
(*g*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 14, 20; see p. 27, *post*.
(*h*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 18, 50 (1) (a); see p. 30, *post*.
(*i*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 61; see p. 36, *post*.
(*k*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 9; see p. 37, *post*.
(*l*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 49 (2); see p. 29, *post*.
(*m*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 6; Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 76.
(*n*) *Ibid.*, s. 5 (1).
(*o*) *Ibid.*, s. 5 (3),
(*p*) *Ibid.*, s. 5 (5).
(*q*) 15 & 16 Vict. c. 31.
(*r*) 25 & 26 Vict. c. 87.
(*s*) 30 & 31 Vict. c. 117.
(*t*) 39 & 40 Vict. c. 45.
(*u*) 56 & 57 Vict. c. 39, s. 5 (4).
(*a*) *Ibid.*, s. 5 (6). An application to record in one part of the United Kingdom

PART II. Registration.

Working men's clubs.

16. Working men's clubs which are registered under the Act (*b*) must also be registered under the Licensing (Consolidation) Act, 1910 (*c*), where any intoxicating liquor is supplied to members or their guests, in the house or any part of the house, or premises, habitually used for the purposes of the club.

Application for registry.

Acknowledgment of registry.

17. For the purpose of registry an application to register the society, signed by seven members and the secretary, and two printed copies of the rules, must be sent to the registrar (*d*). On being satisfied that a society has complied with the statutory provisions as to registry, the registrar will issue an acknowledgment of registry (*e*), which is conclusive evidence of registration, rebuttable only by proof of suspension or cancellation of registry (*f*).

Appeal from refusal to register.

If the registrar refuses to register a society or any rules or amendments of rules, the society may appeal to the High Court (*g*).

Effect of registration.

18. The effect of registration is to make the society a body corporate by the name as described in the acknowledgment of registry, with perpetual succession and a common seal, and with limited liability. Registration vests in the society all property for the time being vested in any person in trust for the society, and does not affect the prosecution of any legal proceedings pending by or against the trustees of the society (*h*).

Part III.—Rules.

SECT. 1.—*In General.*

Rules form the contract of membership.

19. The rules of a registered society form the contract between it and its members, and members and all persons claiming through them are bound by the rules (*i*).

rules or amendments of rules registered in another must be made by the secretary or other officer of the society in Form E or Ea, accompanied by two copies of such rules or amendments under the seal of the Central Office (Treas. Reg. 1894 (5)). As to the manner of recording rules or amendments of rules, see *ibid.* (5a).

(*b*) 56 & 57 Vict. c. 39.

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 91. The conditions of registry under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), differ from those applicable under the former Act. A club may, for example, be struck off the register under the former Act, without knowledge of the Registrar of Friendly Societies; see further, Report of Chief Registrar, 1902, p. 5; and title INTOXICATING LIQUORS.

(*d*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 5 (2). For forms of application to register a society, see Encyclopædia of Forms and Precedents, Vol. X., p. 205; Treas. Reg. 1894 (1), Form A. The fee is £5, reducible to £1 in special cases at the discretion of the Chief Registrar (Treas. Reg. 1894 (44)).

(*e*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 6.

(*f*) *Ibid.*, s. 8.

(*g*) *Ibid.*, s. 7; Industrial and Provident Societies (Amendment) Act, 1895 (58 & 59 Vict. c. 30), s. 3.

(*h*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 21; see *Queensbury Industrial Society* v. *Pickles* (1865), L. R. 1 Exch. 1.

(*i*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 22;

SECT. 1. In General.

A society registered at the date of the Act (*j*), and its members, may respectively exercise any powers given by the Act, and not made to depend on the provisions of its rules, even if such powers override the provisions contained in rules registered prior to the date of the Act (*k*).

Copy as evidence.

20. Every copy of the rules bearing the seal or stamp of the Central Office (*l*) is admissible in evidence without further proof (*m*).

SECT. 2.—*Provisions Common to all Societies.*

What the rules must contain.

21. The rules of any society registered under the Act (*n*) must set forth the object, name, and registered office of the society, the terms of admission of members, including any society or company investing funds in the society, the mode of holding meetings, scale and right of voting, and of making, altering, or rescinding rules.

Officials.

They must provide for the appointment and removal of a committee of management by whatever name known, and of managers or other officers, and for their respective powers and remuneration; and determine the amount of interest, not exceeding £200 sterling, in the shares of the society which any member other than a registered society may hold; whether the shares are to be transferable or withdrawable, with provisions for the form of transfer and registration, and for the mode of withdrawal and payment of balance; and whether the society may contract loans or receive money on deposit from members or others, and if so under what conditions, on what security, and to what limits of amount.

Shares.

Loans and deposits.

Accounts.

Claims.

Provision must also be made for the audit of accounts and the appointment of auditors or a public auditor; as to the claims of the representatives of deceased members, or the trustees of the property of bankrupt members, and the payment of nominees; for the custody and use of the society's seal, and the investment of the society's capital (*o*).

Seal and investments.

Appropriation of profits.

The rules of every registered society must provide for the profits being appropriated to any purposes stated therein or determined in such manner as the rules direct (*p*), and may describe the

compare titles BUILDING SOCIETIES, Vol. III., p. 331; FRIENDLY SOCIETIES, Vol. XV., p. 137. As to supplying copies of rules to members, see p. 16, *post*.

(*j*) 56 & 57 Vict. c. 39.

(*k*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 22.

(*l*) As to the Central Office, see p. 8, *ante*.

(*m*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 75; and as to documentary evidence generally, see title EVIDENCE, Vol. XIII., pp. 510 *et seq.*

(*n*) 56 & 57 Vict. c. 39.

(*o*) *Ibid.*, s. 10 (1), Sched. II. For a specimen form of rules, see Encyclopædia of Forms and Precedents, Vol. X., p. 207. The contents of the rules, which are stated briefly above, are dealt with in detail elsewhere; see pp. 13—38, *post*. The word "rules" as used in the Act, and where consistent with the context, includes the registered rules for the time being and any registered amendment (Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 79).

(*p*) *Ibid.*, s. 10 (6), Sched. II., (10).

SECT. 2. Provisions Common to all Societies.

form of any instrument necessary for carrying its purposes into effect (*q*).

SECT. 3.—*Provisions applicable to Societies taking Land for Small Holdings* (*r*).

Rules for societies taking land for small holdings or allotments.

22. The Board of Agriculture and Fisheries has intimated (*r*) that associations desiring to take land for small holdings or allotments must include provisions to the following effect in their rules (*r*) :—

(1) The objects of the society must include the business of creating, or promoting the creation of, small holdings or allotments, and encouraging their proper cultivation, with power to acquire land for the purpose, to adapt any land so acquired for small holdings or allotments by the erection of buildings or otherwise, and to let the land to members of the society to be cultivated by them as small holdings or allotments.

(2) Separate accounts must be kept by the society of all receipts and expenditure of the society under the rule relating to "Small Holdings and Allotments."

(3) The receipts, whether during the existence of the society or on dissolution, must be applicable only :—(i.) For payment of the expenses of managing land acquired, and of repairs or improvements thereon ; (ii.) for payment to the society of interest on all capital expenditure ; (iii.) for recouping such capital expenditure ; (iv.) for forming a reserve fund not exceeding one year's annual value of the land, and available only for any purpose authorised by this rule ; (v.) for prizes for the encouragement of the proper cultivation of land ; (vi.) for creating or promoting the creation of small holdings or allotments generally. Nothing in this rule is to prejudice or affect any right or remedy of any creditor of the society.

SECT. 4.—*Alteration of Rules.*

Alteration.

23. The rules must provide the mode of altering or rescinding rules (*s*). The power of altering rules is not restricted by statute. The same principles which apply to the alteration of the rules of building (*t*) and friendly (*u*) societies seem applicable to the alteration of rules of industrial and provident societies.

Amendment.

24. A registered society amending any of its rules must forward to the registrar an application for registration of the amendment, accompanied by two copies of the amendment, signed by three members and the secretary (*v*). The registrar, if the

(*q*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 10 (5).

(*r*) See Report of Chief Registrar, 1907, pp. 10, 11 ; and note (*b*), p. 7, *ante*. As to these societies, see p. 7, *ante*, and title SMALL HOLDINGS AND SMALL DWELLINGS. These provisions have also been approved by the Chief Registrar of Friendly Societies.

(*s*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (3). See Encyclopædia of Forms and Precedents, Vol. X., p. 209 (specimen rules).

(*t*) See title BUILDING SOCIETIES, Vol. III., pp. 332 *et seq.*

(*u*) See title FRIENDLY SOCIETIES, Vol. XV., pp. 139 *et seq.*

(*v*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 10 (2). As to the effect of unregistered amendments, see *Re Londonderry Equitable*

amendment is in conformity with the Act (*a*), then issues to the society an acknowledgment of registry (*b*). The acknowledgment is conclusive evidence of registry (*c*), but the fact that an amendment of a rule has been registered is not conclusive as to its legality or validity (*d*). The duty of the registrar is merely to consider whether the proposed amendment complies with the provisions of the Act (*e*). If the registrar refuses to register an amendment of a rule, the proper remedy is by mandamus (*f*).

SECT. 4. Alteration of Rules.

Effect of acknowledgment of registry.

Duty of registrar.

Part IV.—Constitution.

SECT. 1.—*Name.*

25. The name of the society must be set forth in the rules (*g*).

Stated in rules.

26. No registered society may use any name or title other than its registered name. The name must be painted or affixed legibly and conspicuously on the outside of every office or place of business of the society, and must also appear legibly on the seal, and on all notices, advertisements, and other official publications of the society, and on all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods, purporting to be signed by or on behalf of the society, and in all bills of parcels, invoices, receipts, and letters of credit of the society (*h*).

Registered name to be used only and always.

27. No registered society may change its name except by special resolution, with the approval in writing of the registrar (*i*).

Change of name.

Co-operative Society, [1910] 1 I. R. 69. The expression "amendment of rule" includes, if necessary, a new rule and a resolution rescinding a rule (Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 79). The amendment may be either partial or complete (Treas. Reg. 1894 (2)). For compulsory forms of application to register partial or complete amendments, see Treas. Reg. 1894 (3), Forms B and D respectively. They must be respectively accompanied by a statutory declaration in Form C. A complete amendment must bear at the beginning the words "all previous rules rescinded" (Treas. Reg. 1894 (2)).

(*a*) 56 & 57 Vict. c. 39.

(*b*) *Ibid.*, s. 10 (3).

(*c*) *Ibid.*

(*d*) See *Laing* v. *Reed* (1869), 5 Ch. App. 4, a building society case, but the same principle seems applicable.

(*e*) See *R.* v. *Brabrook* (1893), 69 L. T. 718.

(*f*) *Ibid.*

(*g*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (1). As to limitations on choice of name, see p. 9, *ante*.

(*h*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 12. See also title COMPANIES, Vol. V., p. 301. Any officer of a society, or any person on its behalf, contravening this provision is liable to a fine not exceeding £50, and to the holder of any such bill of exchange, promissory note, cheque or order for money or goods for the amount thereof unless the same is paid by the society (Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 66).

(*i*) *Ibid.*, ss. 5 (3), 52. Applications for approval of registrar must be made in Form AA, accompanied by a statutory declaration in Treas. Reg. 1894 (30), Form AB.

SECT. 1. Name.

Effect of change.

Change of name does not affect any right or obligation of the society, or any member. Any pending legal proceedings may be continued by or against the society notwithstanding its new name (*k*).

SECT. 2.—*Seal.*

Seal.

28. Provisions for the custody and use of the seal of the society must be contained in the rules of a registered society (*l*).

SECT. 3.—*Registered Office.*

Registered office.

29. Every registered society must have a registered office, to which all communications and notices must be addressed (*m*). The registered office must be specified in the rules (*n*).

Notice of change.

30. Notice must be sent within fourteen days to the registrar of every change in the situation of the registered office of a society (*o*).

SECT. 4.—*Objects.*

Objects.

31. The object of a registered society must be described in the rules (*p*). The objects of societies, capable of being registered under the Act (*q*), are the carrying on of any industries, businesses, or trades specified in or authorised by the rules, whether wholesale or retail, including dealings of any description with land (*r*).

Strike fund.

32. Where the profits of a registered society are under the rules to be applied "either to increase the capital, reserve fund, or business of the society, or to any lawful purpose," a subscription to a strike fund is *ultra vires* (*s*).

Apprentices.

33. Though a registered society has no express statutory authority to take apprentices, it has an implied power to do all acts which are directly incidental to the business for which it is incorporated, and on that ground may take apprentices (*a*).

SECT. 5.—*Government.*

Committee of management, and officers.

34. The rules of a registered society must provide for the appointment and removal of a committee of management and of

(*k*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 52.

(*l*) *Ibid.*, Sched. II. (11). The registered name must be legibly engraved on the seal (*ibid.*, s. 12); see p. 13, *ante*, and title COMPANIES, Vol. V., p. 301.

(*m*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 11.

(*n*) *Ibid.*, Sched. II. (1).

(*o*) *Ibid.*, s. 11; Treas. Reg. 1894 (11), Form K.

(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (1).

(*q*) 56 & 67 Vict. c. 39.

(*r*) *Ibid.*, s. 4. See also p. 5, *ante*. For form of rules, see Encyclopædia of Forms and Precedents, Vol. X., p. 207.

(*s*) *Warburton* v. *Huddersfield Industrial Society*, [1892] 1 Q. B. 817, C. A., a case decided on the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 12 (7).

(*a*) *Burnley Equitable Co-operative and Industrial Society* v. *Casson*, [1891] 1 Q. B. 75.

officers, and specify their respective powers and remuneration (*b*). Infants are not eligible as members of the committee, trustees, managers, or treasurers of a registered society (*c*).

SECT. 5. Government.

Infants.

SECT. 6.—*Members and their Rights and Liabilities.*

SUB-SECT. 1.—*Membership.*

General regulations.

35. The rules of a registered society must regulate the admission of members (*d*). There are no statutory formalities for joining a society, and no statutory restriction limiting the number of members, but no member other than a registered society may have or claim any interest in the shares of the society exceeding £200 (*e*). Any other body corporate may, if its regulations permit, hold shares by its corporate name in a registered society (*f*).

Infants.

36. An infant above sixteen years of age may, subject to a contrary provision in the rules, be a member of a registered society, and may generally enjoy the rights of an adult member, and execute and give all necessary instruments and acquittances (*g*), but he is not eligible as an officer (*h*).

A contract by an infant member of a co-operative land society for the purchase of an allotment from the society is voidable, not void, and may be ratified by the infant on his attaining majority (*i*).

Register of members.

37. The register of list of members or shares kept by any society is *primâ facie* evidence of—(1) the names, addresses and occupations of the members and the number of shares held by each member, the numbers of such shares, if numbered, and the amount paid or agreed to be considered as paid on them; (2) the date of entry on the register in proof of membership; and (3) the date of cesser of membership (*k*).

SUB-SECT. 2.—*Inspection of Books.*

Inspection of books.

38. Any member or person having an interest in the funds of a registered society may inspect his own account and the books containing the names of the members at all reasonable hours. The

(*b*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (4); Encyclopædia of Forms and Precedents, Vol. X., p. 209. The term "committee" means the committee of management or other directing body of the society, and the term "officer" extends to any treasurer, secretary, member of committee, manager, or servant other than a servant appointed by the committee (Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 79). As to the powers and duties of the committee and officers, see p. 24, *post*.

(*c*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 32.

(*d*) *Ibid.*, Sched. II. (2). See Encyclopædia of Forms and Precedents, Vol. X., p. 208 (4). As to the effect of membership on qualification for municipal office, see title LOCAL GOVERNMENT.

(*e*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s 4 (a).

(*f*) *Ibid.*, s. 42. See also *ibid.*, s. 38 (1) (c), (2).

(*g*) *Ibid.*, s. 32.

(*h*) *Ibid.* See *supra*.

(*i*) *Whittingham* v. *Murdy* (1889), 60 L. T. 956. As to contracts of infants generally, see title INFANTS AND CHILDREN, pp. 61, 63 *et seq.*, *post*.

(*k*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 34.

SECT. 6. Members and their Rights and Liabilities.

time and manner of inspection may be regulated by the general meetings of the society (*l*). The inspection of any other books may be authorised by rules registered after the 12th September, 1893, but not so as to permit the inspection, by any person other than an officer or person specially authorised by a resolution of the society, of the loan or deposit account of any other member without his written consent (*m*). Save as above mentioned, no person has any right to inspect the books of a registered society, notwithstanding anything in the rules (*n*).

Appointment of accountant to inspect books.

Security for costs.

39. The registrar may, on the application of ten members of a registered society, who have been members for not less than twelve months, appoint an accountant or actuary to inspect the books of the society and make a report to him (*o*). The applicants must give security for the costs of the inspection, but the registrar may direct payment by the applicants, or the society, or the members or officers, past or present (*p*). The person appointed may make copies or extracts from the books, and the registrar must communicate the results of the inspection to the applicants and the society (*q*).

SUB-SECT. 3.—*Supply of Copies of Rules and Returns.*

Supply of copies.

40. Any person is entitled on demand and on payment of a sum not exceeding 1*s.* to a copy of the rules of a registered society (*r*), and every member or person interested in the funds of a registered society is entitled on application to be supplied gratuitously with a copy of the last annual return of the society (*s*).

SUB-SECT. 4.—*Transfer and Withdrawal of Shares.*

Transfer and withdrawal of shares.

41. The rules of a registered society should provide as to the transfer or withdrawal, and for the form of transfer and the mode of withdrawal, of shares or any of them, and for payment of the balance due thereon on withdrawal (*t*).

SUB-SECT. 5.—*Lunacy and Bankruptcy.*

Lunacy.

42. Where a member or person claiming through a member of a society, whether registered or not, is insane, and there is no

(*l*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 17 (2).
(*m*) *Ibid.*, s. 17 (3).
(*n*) *Ibid.*, s. 17 (1).
(*o*) *Ibid.*, s. 18 (1). For form of application, see Encyclopædia of Forms and Precedents, Vol. X., p. 218 ; Treas. Reg. 1894 (12), Form L.
(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 18 (2).
(*q*) *Ibid.*, s. 18 (3), (4).
(*r*) *Ibid.*, s. 10 (4). Delivery of untrue rules is a statutory offence, punishable by a fine not exceeding £5 (*ibid.*, ss. 67, 68).
(*s*) *Ibid.*, s. 15. Falsification of a return is a statutory offence punishable by a fine not exceeding £50 (*ibid.*, s. 65 ; see also *ibid.*, s. 62 (3)). For non-delivery, the fine is up to £5 (*ibid.*, ss. 62 (1), 68).
(*t*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (7). See Encyclopædia of Forms and Precedents, Vol. X., pp. 212, 214. As to the effect of withdrawals, see *Re United Service Share Purchase Society, Ltd.*, [1909] 2 Ch. 526. As to forged transfers, see Forged Transfers

committee or trustee of his property, the committee of the society may, at their discretion, pay the amount of the shares, loans, and deposits, not exceeding £100, belonging to such member or person, to any person whom they may deem proper to receive them on behalf of the lunatic. The receipt of the payee is a good discharge to the society (*a*). But a mere book entry transferring money belonging to a lunatic member to his wife's account in the same society is not such a payment as will relieve the society from a claim, of which it had notice prior to the transfer, by guardians for reimbursement in respect of the lunatic's maintenance. Probably even actual payment in such circumstances would not protect the society against such a claim (*b*).

Bankruptcy.

43. The rules of a registered society must provide for the transfer or payment of the property or moneys of a bankrupt member to the trustee of his property (*c*).

SUB-SECT. 6.—*Nomination.*

Of sums not exceeding £100.

44. A member of a registered society of sixteen years of age and upwards may dispose by nomination of sums, not exceeding £100 at the date of the nomination (*d*), credited to him in the books of the society (*e*).

Form.

The nomination must be in writing (*f*), or in print (*g*), and signed by the nominator (*h*). Signature by mark is probably insufficient (*i*). It must be delivered at or sent to the registered office of the society (*k*), and recorded by the society (*l*) during the life of the nominator (*m*), or made in a book kept at the office (*n*).

By will.

A will may operate as a nomination if the original document is left in the custody of the office, but the mere production of the will or probate is not sufficient (*o*).

Acts, 1891 (54 & 55 Vict. c. 43), s. 3; 1892 (55 & 56 Vict. c. 36); and title COMPANIES, Vol. V., pp. 195, 358, 698.

(*a*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 29, 30.

(*b*) *Gloucester Union* v. *Gloucester Co-operative and Industrial Society, Ltd.* (1907), 71 J. P. 169, C. A.; compare *Cardiff Union* v. *Bank and Neels* (1908), 72 J. P. 319.

(*c*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (9); Encyclopædia of Forms and Precedents, Vol. X., p. 216.

(*d*) *Griffiths* v. *Eccles Provident Industrial Co-operative Society, Ltd.* (1911), 27 T. L. R. 375, C. A.; *In the Goods of Baxter*, [1903] P. 12.

(*e*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25 (1). For form of nomination, compare Encyclopædia of Forms and Precedents, Vol. VI., p. 69. See also generally, as to nominations, title FRIENDLY SOCIETIES, Vol. XV., pp. 152 *et seq.*

(*f*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25 (1).

(*g*) See Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 20.

(*h*) See *Wright* v. *Darkhouse Friendly Society* (1890), Diprose and Gammon, 407.

(*i*) See *Morton* v. *French*, [1908] S. C. 171.

(*k*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25 (1).

(*l*) *Ibid.*, s. 25 (3); Treas. Reg. 1894 (13).

(*m*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25 (1). See *Fielding and Lord* v. *Rochdale Equitable Pioneers Society* (1892), 92 L. T. Jo. 431.

(*n*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25 (1).

(*o*) See *Fielding and Lord* v. *Rochdale Equitable Pioneers Society, supra.*

SECT. 6. Members and their Rights and Liabilities.

45. Any person may be a nominee except an officer or servant of the society, who can be the nominee only when he or she is the husband, wife, father, mother, child, brother, sister, nephew, or niece of the nominator (*p*). A nomination may be made to more than one nominee (*q*).

Who can be nominee.

What can be nominated.

46. The property capable of being nominated is the property of a member in the society, or so much as is specified in the nomination, and may consist of shares, loans, or deposits, up to £100 sterling (*r*).

Revocation or variation of nomination.

47. A nomination may be revoked or varied by a document under the hand of the nominator delivered, sent, or made in the same way as a nomination (*s*). But a nomination is not revocable or variable by will or codicil (*t*), nor is there any statutory provision, as in the case of friendly societies, by which marriage operates as a revocation (*a*).

Entries in society's books.

48. The names of persons nominated, and details of revocations and variations, must be regularly entered by the society in a book. Property comprised in a nomination is payable or transferable to the nominees, even if the rules of the society declare the shares to be generally not transferable (*b*).

Transfer or payment.

49. On proof of the death of a nominator, the committee of the society is bound to transfer or pay over the value of the property comprised in the nomination. But transference of shares is not allowed to raise the share capital of any nominee to a sum exceeding £200. Any surplus in such circumstances is paid to the nominee (*c*).

Rival claims.

A simple method of dealing with rival claims to moneys standing to the credit of a deceased member is to institute interpleader proceedings (*d*).

(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25 (1).

(*q*) *Ibid.* Compare title FRIENDLY SOCIETIES, Vol. XV., p. 153.

(*r*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25 (1), which does not limit the amount payable on the death of a member, but only the sum payable by nomination. If the amount is over £100, a nomination even of part is invalid (*Barnes* v. *St. Crispin Productive Society* (1901), Report of Chief Registrar, p. 23). The time at which the limit of the amount is to be taken is the date of nomination, not of the nominator's death (*Griffiths* v. *Eccles Provident Industrial Co-operative Society, Ltd.* (1911), 27 T. L. R. 375, C. A.).

(*s*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25 (2).

(*t*) *Ibid.* Compare title FRIENDLY SOCIETIES, Vol. XV., p. 153. Forms of revocation or variation may be adapted from the friendly society forms in the Encyclopædia of Forms and Precedents, Vol. VI., p. 69.

(*a*) Compare Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 56 (5).

(*b*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 25 (3).

(*c*) *Ibid.*, s. 26 (1). As to the evidence the committee requires before payment, if the estate of the member exceeds £80, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 192. As to payment of estate duty on property which passes under a nomination, or without probate or letters of administration, see Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 28; titles ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 201; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 192; FRIENDLY SOCIETIES, Vol. XV., p. 152.

(*d*) *Jessop* v. *Huddersfield Industrial Society* (1899), 80 L. T. 598. As to interpleader generally, see title INTERPLEADER, pp. 576 *et seq.*, *post.*

SUB-SECT. 7.—*Testacy and Intestacy.*

Settlement of claims.

50. The rules of a registered society must provide for the claims of deceased members being settled (*e*).

Testacy without nomination.

51. If any member of a registered society dies testate without having made a nomination then subsisting, the ordinary rules of law apply, and the moneys due to him from the society are payable to his executor.

Intestacy without nomination.

52. If, however, a member entitled to property in a registered society, not exceeding in the whole £100, dies intestate, and without having made a nomination then subsisting, the committee may either pay over the money to his administrator (*f*), or may distribute the same among such persons as appear to them entitled (*g*).

SUB-SECT. 8.—*Liabilities.*

Creditors must look to society.

53. The creditors of a registered industrial and provident society must look to the society for payment of their debts and not to the individual members (*h*).

Unless society is unregistered.

54. An unregistered society has no existence in law apart from its members (*i*), and therefore, applying the doctrine of principal and agent, it would appear that as regards liability to outside creditors the individual members are personally liable for all ordinary debts properly incurred by the directors or trustees for the ordinary purposes of the society while they remain members (*k*).

Income tax.

55. Though in certain circumstances a registered society is not chargeable under Schedules C and D of the Income Tax Acts (*l*), no member of or person employed by the society is exempt from any assessment to such duties to which he would otherwise be liable (*m*).

(*e*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (9). See Encyclopædia of Forms and Precedents, Vol. X., pp. 215, 216.

(*f*) See *Escritt* v. *Todmorden Co-operative Society*, [1896] 1 Q. B. 461.

(*g*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 27 (1). See *Symington's Executor* v. *Galashiels Co-operative Store Co., Ltd.* (1894), 21 R. (Ct. of Sess.) 371; and title FRIENDLY SOCIETIES, Vol. XV., p. 151. As to evidence required before payment, see note (*c*), p. 18, *ante*. As to the property of illegitimates, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 192.

(*h*) *Re Sheffield and South Yorkshire Permanent Building Society* (1889), 22 Q. B. D. 470, *per* CAVE, J., at p. 476. See also *Burton* v. *Tannahill* (1856), 5 E. & B. 797. Compare *Myers* v. *Rawson* (1860), 5 H. & N. 99, decided prior to the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), which incorporated societies registered under that Act. As to the liability of members on a winding-up, see p. 35, *post*; *Re United Service Share Purchase Society, Ltd.*, [1909] 2 Ch. 526.

(*i*) See *Re Kent Benefit Building Society* (1861), 1 Drew. & Sm. 417.

(*k*) See *Murray* v. *Scott, Agnew* v. *Murray, Brimelow* v. *Murray* (1884), 9 App. Cas. 519, 546—548; *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352; *R.* v. *Tankard*, [1894] 1 Q. B. 548; and title BUILDING SOCIETIES, Vol. III., p. 352. The status of unregistered societies is difficult to define; see title FRIENDLY SOCIETIES, Vol. XV., p. 127.

(*l*) See p. 27, *post*, and title INCOME TAX, Vol. XVI., p. 641.

(*m*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 24.

Part V.—Property and Funds.

SECT. 1. Property.

SECT. 1.—*Property.*

SUB-SECT. 1.—*Powers to hold and dispose of Land.*

Powers.

56. A registered society may, if the rules do not direct otherwise, hold, purchase, or take on lease in its own name any land (*n*). It may also sell, exchange, mortgage, lease, or build upon the same, or grant bonds and dispositions on security or other heritable securities over the same, with power to alter and pull down buildings and again rebuild. Purchasers, assignees, mortgagees, tenants, or bondholders are not bound to inquire as to the authority for any disposition by the society, and the receipt of the society is a good discharge (*o*).

Rents payable by tenants.

57. Where the rules of a registered society provide that the tenants of land of the society shall be charged a fair and usual rent for their occupation, a tenant is not entitled to have a fixed rent, but the rent may be varied from time to time (*p*).

SUB-SECT. 2.—*Copyholds.*

Admission of tenants.

58. Where a registered society is entitled in equity to copyholds or customary freeholds either absolutely or by way of mortgage, the society may require the lord of the manor to admit as tenants not more than three persons on payment of the fines payable on the admission of a single tenant. Alternatively the lord of the manor may admit the society as tenant on payment of a special fine agreed upon (*q*).

SECT. 2.—*Borrowing Powers and Deposits.*

Loans and deposits.

59. The rules of a registered society must provide whether the society may contract loans or receive money on deposit from members or others, and, if so, under what conditions, on what security, and to what limits of amount (*r*).

Debentures.

The debentures of a registered society, charging the society's personal chattels with the payment of money, are not exempted from the operation of the Bills of Sale Acts, 1878 (*s*) and 1882 (*t*).

(*n*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 36. This would not, it seems, render a devise of land to a registered society valid, see *Re Amos, Carrier* v. *Price*, [1891] 3 Ch. 159, which was decided upon a similar provision in the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 7. "Land" includes hereditaments and chattels real of whatever description (Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 79).

(*o*) *Ibid.*, s. 36.

(*p*) *Tenant Co-operators, Ltd.* v. *James* (1902), 18 T. L. R. 237.

(*q*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 37. Compare Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 28, and Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 48. As to admittance, see title COPYHOLDS, Vol. VIII., pp. 89 *et seq.*

(*r*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (6). See Encyclopædia of Forms and Precedents, Vol. X., p. 211. As to conditions of banking by registered societies, see further, p. 4, *ante*.

(*s*) 41 & 42 Vict. c. 31.

(*t*) 45 & 46 Vict. c. 43; *Great Northern Rail. Co.* v. *Coal Co-operative Society*,

SECT. 3.—*Investments.*

SECT. 3. Investments.

Investment of capital

Scope.

60. The rules of registered societies must provide whether and by what authority and in what manner any part of the capital may be invested (*u*).

If the rules do not otherwise direct, investment is permitted (1) in authorised trustee securities; (2) in or upon any mortgage, bond, debenture, debenture stock, corporation stock, annuity, rentcharge, rent, or other security (not being securities payable to bearer) authorised by any Act of Parliament, passed or to be passed, of any local authority (*x*), and (3) in the shares or on the security of any other society registered or deemed to be registered under the Act (*a*), the Building Societies Acts (*b*), or of any company registered under the Companies Acts or incorporated by Act of Parliament or by charter (*c*). But no investment may be made in the shares of a society or company with unlimited liability (*d*).

Investments prior to 1894.

61. Investments made before the passing of the Act (*e*), which would have been valid if the Act had been in force, were confirmed and ratified by the Act (*f*).

Investment in savings bank.

62. A society which is not chargeable with income tax under the Act (*g*) may invest its capital and funds, or any part thereof, to any amount in any savings bank certified under the Trustee Savings Banks Act, 1863 (*h*), or in a post office savings bank (*i*).

Proxy in respect of investments.

63. A registered society which has invested any part of its capital in the shares or on the security of any other body corporate may appoint as its proxy any one of its members, who can act for all purposes except for the transfer of the shares or the giving receipts for dividends thereon (*k*).

Transfer of stock standing in name of trustee.

64. The registrar may direct a transfer of stock, transferable at the Bank of England or Ireland, which is vested in a trustee of a registered society, either jointly with another or others or solely, when such trustee is abroad, bankrupt, lunatic, or dead, or when

[1896] 1 Ch. 187. See titles BILLS OF SALE, Vol. III., p. 19; COMPANIES, Vol. V., p. 365, note (*b*).

(*u*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 38 (1), Sched. II. (12). See Encyclopædia of Forms and Precedents, Vol. X., p. 216. Compare title FRIENDLY SOCIETIES, Vol. XV., p. 167.

(*x*) As defined by the Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 34.

(*a*) 56 & 57 Vict. c. 39.

(*b*) See title BUILDING SOCIETIES, Vol. III., pp. 321 *et seq.*

(*c*) See title COMPANIES, Vol. V., pp. 33 *et seq.*, 674, 744.

(*d*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 38 (1), (2).

(*e*) 56 & 57 Vict. c. 39.

(*f*) *Ibid.*, s. 38 (3).

(*g*) *Ibid.*, s. 24.

(*h*) 26 & 27 Vict. c. 87.

(*i*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 39. See title BANKERS AND BANKING, Vol. I., pp. 571–580.

(*k*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 41; compare Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 68, and title COMPANIES, Vol. V., p. 258.

SECT. 3. Investments.

he has been removed from the office of trustee, or when it is unknown whether he is living or dead (*l*).

SECT. 4.—*Loans and Mortgages.*

Advances to members.

65. The rules of a registered society may provide for advances of money to members on the security of real or personal property, or, in the case of a society registered to carry on banking business, in any manner customary in the conduct of such business (*m*).

Where a member mortgages property to a society to secure moneys payable by him under the rules, and "other moneys becoming due from the mortgagor to the society," the words "other moneys" do not include moneys embezzled by the mortgagor when acting as secretary of the society (*n*).

Receipt in lieu of reconveyance.

66. On payment of moneys secured to a registered society by mortgage, no reconveyance is necessary if a receipt in the statutory form (*o*), or in any form specified in the rules, signed by two members of the committee, and countersigned by the secretary, is indorsed on the mortgage (*p*).

Satisfaction of registered mortgage or mortgage of copyholds.

67. Where a mortgage is registered under any Act for the registration of deeds or titles (*a*) or comprises copyholds and is entered on any court rolls, the registrar under such Act, or steward of the manor, must, on production of the statutory receipt, verified by oath or statutory declaration, enter satisfaction of the mortgage on the register or on the court rolls, and grant a certificate, either upon the mortgage or assurance, or separately, to the like effect. The certificate is receivable as evidence (*b*).

Land Transfer Rules.

In order to enable a society to retain a mortgage of registered land for the purpose of indorsing the statutory receipt, the original mortgage will be delivered to it after registration upon delivery at the Land Registry of a verified copy (*c*). The original mortgage will

(*l*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 31 (1), (2), (3). For forms of application to the registrar to order a transfer of stock to new trustees, and of statutory declaration verifying such application, see Treas. Reg. 1894 (14)—(17).

(*m*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 40. See Encyclopædia of Forms and Precedents, Vol. X., p. 216.

(*n*) *Bailes* v. *Sunderland Equitable Industrial Society, Ltd.* (1886), 55 L. T. 808.

(*o*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. III., Form A. The receipt is termed a "vacating receipt." As to reconveyances in general, see title MORTGAGE.

(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 43 (1). The similar section in the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 42, has received judicial interpretation on several occasions; see titles BUILDING SOCIETIES, Vol. III., pp. 370—372; FRIENDLY SOCIETIES, Vol. XV., pp. 166, 167. As to the discharge of mortgages in Scotland, see Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 44. If a registered society is in liquidation, the statutory receipt will be signed by the liquidator (*ibid.*, s. 45).

(*a*) As to registration of deeds and of title generally, see title REAL PROPERTY AND CHATTELS REAL.

(*b*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 43 (2). The fee for entry and certificate is 2*s.* 6*d.* (*ibid.*). Compare title FRIENDLY SOCIETIES, Vol. XV., p. 167.

(*c*) Land Transfer Rules, 1903, r. 121; Statutory Rules and Orders Revised, Vol. VII., Land (Registration) England, pp. 33 *et seq.*

be thenceforth treated as the certificate of charge, and must be indorsed with notes of the various dealings, and on discharge will be delivered up and retained in the Land Registry (*d*).

Instrument of discharge.

On payment of all moneys intended to be secured by any mortgage or charge in favour of any industrial and provident society, registered or unregistered, an instrument of discharge in the official form duly executed has the same effect as a receipt indorsed (*e*).

Stamp duty.

68. Apparently the usual stamp duty is payable on statutory receipts in England and Ireland, but not in Scotland (*f*).

Part VI.—The Society as a Going Concern.

SECT. 1.—*Meetings.*

SUB-SECT. 1.—*In General.*

Mode of holding.

69. The mode of holding meetings, and the scale and right of voting, are matters to be provided for in the rules of a registered society (*g*).

Voting.

70. Members may vote by proxy at meetings if the rules so admit (*h*), but no such right exists at common law (*i*).

SUB-SECT. 2.—*Special Resolutions.*

Special resolutions.

71. For the purposes of the Act (*j*) a special resolution is one which has been (1) passed by a majority of not less than three-fourths of the votes of those members of a registered society who (being entitled to vote under the rules) vote in person or by proxy (if the rules so admit) at a general meeting of which notice specifying the intention to propose the resolution has been duly given according to the rules (*k*), and (2) confirmed by a majority of those members who (being entitled under the rules to vote) vote in person or by proxy (if the rules so admit) at a subsequent general meeting of which due notice has been given, and which must be held not less than fourteen days nor more than one month after the general meeting at which the resolution was first passed (*l*).

(*d*) Land Transfer Rules, 1903, r. 122.

(*e*) *Ibid.*, r. 167.

(*f*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 44 (5), 45. Compare titles BUILDING SOCIETIES, Vol. III., p. 372; FRIENDLY SOCIETIES, Vol. XV., p. 161. As to the discharge of mortgages and the stamp duty thereon, see title MORTGAGE.

(*g*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (3). See Encyclopædia of Forms and Precedents, Vol. X., pp. 208, 209. The expression "meeting" for the purpose of the Act includes, where the rules of the society allow, a meeting of delegates appointed by members (Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 79).

(*h*) *Ibid.*, s. 51 (a), (b).

(*i*) See *Harben* v. *Phillips* (1883), 23 Ch. D. 14, C. A., *per* BOWEN, L.J., at p. 35; and title COMPANIES, Vol. V., p. 258.

(*j*) 56 & 57 Vict. c. 39.

(*k*) *Ibid.*, s. 51 (a).

(*l*) *Ibid.*, s. 51 (b).

SECT. 1. Meetings.

Evidence.

At either of the meetings mentioned above, a declaration by the chairman that the resolution has been carried is conclusive evidence of the fact (*m*).

Registration.

72. A copy of every special resolution, signed by the chairman of the meeting at which the resolution was confirmed, and countersigned by the secretary of the society, must be sent to the Central Office (*n*) and there registered. Until registration it is inoperative (*o*).

SUB-SECT. 3.—*Special Meetings.*

Special meetings.

Application.

73. The registrar may, on the application of one-tenth of the members of a registered society, or of 100 members if there are more than 1000, call a special meeting of the society (*p*). The application must be supported by evidence showing that the applicants have good reason for requiring such meeting to be called and are not actuated by malice, and such notice must be given to the society as the registrar may direct (*q*). The applicants may be required to give security for the costs of the proposed meeting (*r*). The registrar may direct the payment of the costs of and incidental to such meeting by the applicants, the society, the officers or members, or former officers or members (*s*). He may also determine the time and place of the meeting and the matters to be discussed. A special meeting has all the powers of a meeting called under the rules, and may appoint its own chairman, any rule of the society to the contrary notwithstanding (*t*). The chairman of the special meeting must report to the registrar (*a*).

Time and place.

Powers.

Report.

SECT. 2.—*Administration.*

SUB-SECT. 1.—*Committee and Officers.*

Powers and duties of committee.

74. The committee of management are usually entrusted under the rules, which must set out the powers of that committee and of the officers (*b*), with the conduct of the business and affairs of the society, the settling of payments for work or service done on account of the society, and the choice, appointment, and removal of employees, subject to any directions given by the society in general meeting (*c*).

(*m*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 51.
(*n*) See p. 8, *ante*.
(*o*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 56; Treas. Reg. 1894 (35), (36).
(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 50 (1) (b). The notice of a special meeting must be in Form Z, Treas. Reg. 1894 (28).
(*q*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 50 (2).
(*r*) *Ibid.*, s. 50 (3).
(*s*) *Ibid.*, s. 50 (4).
(*t*) *Ibid.*, s. 50 (6).
(*a*) Treas. Reg. 1894 (29), Form ZA.
(*b*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (4).
(*c*) See Encyclopædia of Forms and Precedents, Vol. X., p. 210. As to the

Validity of payments of committee.

75. All payments or transfers made by the committee of a registered society, acting within their statutory powers, are valid as against any demand made upon the committee or society by any other person (*d*).

Fidelity guarantee.

Sureties required by committee.

76. An officer of a registered society having the receipt or charge of money belonging to the society must, if the rules of the society so require, before entering on his office, enter into a bond (*e*), either with or without a surety as the committee may require, or give the security of a guarantee society in such sum as the committee direct, to secure the rendering of a true account of the moneys received and paid by him on account of the society, and the payment of all sums due from him to the society (*f*).

Liability of officials to account.

77. Every officer (*g*) of a registered society having receipt or charge of money, his executors or administrators, must at the times enjoined by the rules, or upon demand, (1) give in his account; and (2) pay over all moneys and deliver all property for the time being in his hands or custody to the person appointed by the society or committee (*h*).

Remedies on default.

In the event of any neglect or refusal to perform these obligations, the society may either sue upon the bond or security which the officer has entered into (*i*), or apply to the county court, or to a court of summary jurisdiction, and upon such an application the county court may proceed in a summary way. An order so made by a county court or court of summary jurisdiction is not subject to any appeal (*k*). The application to the county court, whether any bond be put in suit or not, must be by action commenced in the ordinary way (*l*).

Suit in High Court.

78. Independently of these provisions a society can, it seems, sue its officers in the High Court, claiming, *e.g.*, an account of moneys misappropriated or retained, payment, and damages for breach of trust (*m*).

power of the committee with regard to the property of deceased or lunatic members, see pp. 16—19, *ante*.

(*d*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 30.

(*e*) For form, see *ibid.*, Sched. III.

(*f*) *Ibid.*, s. 47. As to guarantee bonds generally, see titles GUARANTEE, Vol. XV., pp. 437 *et seq.*; INSURANCE, pp. 572 *et seq.*, *post*.

(*g*) Including every servant of a registered society in receipt or charge of money in every case where he is not engaged under a special agreement to account (Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 48 (2)).

(*h*) *Ibid.*, s. 48 (1).

(*i*) See *supra*.

(*k*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 48 (1).

(*l*) County Court Rules, 1903, Ord. 41, r. 7; see title COUNTY COURTS, Vol. VIII., p. 657.

(*m*) *Municipal Permanent Investment Building Society* v. *Richards* (1888), 39 Ch. D. 372, C. A. Such a claim, even where the officer is a member of the society, is not "a dispute" between the society and a member thereof "in his capacity as member," and as such to be referred to arbitration (see *ibid.*).

SECT. 2. Administration.

SUB-SECT. 2.—*Contracts, Bills, and Notes.*

Contracts.

79. Contracts on behalf of a registered society binding the society and all other parties thereto may be made, varied, or discharged in the following ways (*n*):—

Under seal.

(1) A contract which, if made between private persons, must be in writing and under seal, may likewise be made, varied, or discharged on behalf of the society in writing and under the seal of the society.

Under hand.

(2) Where the contract, if made between private persons, must be in writing and signed by the persons to be charged therewith, it may be made, varied, or discharged on behalf of the society in writing by any person acting under the express or implied authority of the society.

Variation or discharge not under seal.

(3) Any contract under seal which, if made between private persons, might be varied or discharged by a writing not under seal, signed by any interested person, may be similarly varied or discharged on behalf of the society by a writing not under seal, signed by any person acting under its express or implied authority (*o*).

Parol.

(4) A contract which would be valid if made by parol only between private persons may similarly be made, varied, or discharged by parol on behalf of the society by any person acting under its express authority (*p*).

Signature of officer.

80. A signature purporting to be made by an official of the society, attached to any writing purporting to make, vary, or discharge a contract on behalf of the society, is *primâ facie* taken to be the signature of the person holding such office (*q*).

Promissory notes etc.

81. Promissory notes or bills of exchange, if made, accepted, or indorsed in the name of the society (*r*), or on its behalf by any person acting under its authority (*s*), are to be deemed to have been made, accepted, or indorsed on behalf of such society (*a*).

SUB-SECT. 3.—*Profits.*

Appropriation.

82. The rules of a registered society must provide for the appropriation of the profits to the purposes specified in the rules, or determined as the rules direct (*b*).

(*n*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 35. Compare the similar provisions affecting joint stock companies, see the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 76, and title COMPANIES, Vol. V., pp. 299, 300.

(*o*) As to the effect of the Bills of Sale Acts upon debentures issued by a registered society, see title BILLS OF SALE, Vol. III., p. 19.

(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 35 (a), (b), (c), (d).

(*q*) *I bid.*, s. 35 (e). As to contracts by agents, see titles AGENCY, Vol. I., pp. 206 *et seq.*; COMPANIES, Vol. V., p. 710.

(*r*) As to the power of a society to issue negotiable instruments, see *Re Peruvian Railways Co., Peruvian Railways Co.* v. *Thames and Mersey Marine Insurance Co.* (1867), 2 Ch. App. 617, 623.

(*s*) As to the meaning of the expression "acting under its authority," see *Premier Industrial Bank, Ltd.* v. *Carlton Manufacturing Co., Ltd., and Crabtree, Ltd.*, [1909] 1 K. B. 106.

(*a*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 33. Compare *Gray* v. *Raper* (1866), L. R. 1 C. P. 694. See *Chapman* v. *Smethurst*, [1909] 1 K. B. 927, C. A.

(*b*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39),

83. A registered society is not chargeable with income tax (*c*) unless it sells to non-members, and the number of shares of the society is limited either by its rules or its practice (*d*). When chargeable with income tax.

SUB-SECT. 4.—*Audit.*

84. Provision for the audit of accounts and for the appointment of auditors, or a public auditor, must be made in the rules of a registered society (*e*). Rules.

85. At least once a year a registered society must have its accounts audited, either (1) by one of the public auditors appointed by the Treasury for the purpose, or (2) by two or more persons appointed in accordance with the rules (*f*). Annual audit.

The auditors must be given access to all the books, deeds, documents, and accounts of the society. After examining and verifying the balance sheets, showing the receipts and expenditure, funds and effects of the society, they must either (1) sign them as correct, duly vouched, and in accordance with law, or (2) specially report to the society in what respects they find them incorrect, unvouched, or not in accordance with law (*g*). A copy of the last balance sheet, with the auditor's report, must always be kept suspended in a conspicuous place at the registered office of the society (*h*). Powers and duties of auditors.

SUB-SECT. 5.—*Annual Returns.*

86. Every registered society must once a year, not later than the 31st March, send to the registrar an annual return, prepared in the form and containing such particulars as are prescribed by the registrar (*i*), of the receipts and expenditure, funds and effects of the society as audited, and a copy of the report or reports of the auditors made during the period covered by the return. The return must (1) be signed by the auditors, (2) show separately the society's expenditure in respect of its several objects, (3) date from the registration of the society or the last annual return to the last published balance sheet, if the date of the balance sheet is not more than one month before or after the 31st December then last, or otherwise Particulars in annual returns.

s. 10 (6), Sched. II. (10). See Encyclopædia of Forms and Precedents, Vol. X., p. 216, and *Warburton* v. *Huddersfield Industrial Society*, [1892] 1 Q. B. 817, C. A., decided on a similar sub-section (s. 12 (7)) of the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), as to whether a certain proposed expenditure was for a lawful purpose within that sub-section. The Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 10 (6), omits the word "lawful," and provides for profits being applied to "any purposes" stated in the rules.

(*c*) *I.e.*, under Scheds. C and D; see title INCOME TAX, Vol. XVI., p. 641.

(*d*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. **24**. As to non-exemption of members from assessment to such duties, see p. 19, *ante*.

(*e*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), Sched. II. (8). See Encyclopædia of Forms and Precedents, Vol. X., p. 213.

(*f*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 13 (1), 72.

(*g*) *Ibid.*, s. 13 (2). As to penalties for any breach of the statutory provisions relating to accounts, annual returns etc., see *ibid.*, ss. 62 (1), 65, 68; and pp. 31 *et seq.*, *post*.

(*h*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 16.

(*i*) *Ibid.*, s. 20.

SECT. 2. Administration.

to the 31st December, and (4) state particulars respecting the auditor or auditors, and his or their appointment (*k*).

Every member or person interested in the funds of the society is entitled to receive gratuitously a copy of the annual return (*l*).

SECT. 3.—*Remedies.*

SUB-SECT. 1.—*Settlement of Disputes.*

Usually provided for in rules.

87. There is no statutory obligation upon a society registered under the Act to provide in its rules for the settlement of disputes, but it is commonly done (*m*). Such a society has ample power to frame rules so as either to include or exclude the provisions of the Arbitration Act, 1889 (*n*).

Decision to be in accordance with rules.

88. Disputes between a member of a registered society, or any person aggrieved (*o*) who has for not more than six months ceased to be a member, or any person claiming through such member or person aggrieved, or claiming under the rules of a registered society on the one hand, and the society or an officer thereof on the other, must be decided as the rules direct, if they contain any such direction (*p*).

Effect of decision.

89. A decision made in accordance with the rules is binding and conclusive on all parties. No appeal lies from it, nor can it be removed into any court of law nor be restrained by injunction (*q*).

Application for the enforcement of a decision made in accordance with the rules may be made to the county court (*r*).

Court of summary jurisdiction.

90. Where the rules of a society direct that disputes shall be referred to justices, the dispute must be determined by a court of summary jurisdiction (*s*). But any dispute cognisable under the rules of a society by a court of summary jurisdiction may, if the parties consent, be referred to and determined by the county court (*t*).

(*k*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 14.

(*l*) *Ibid.*, s. 15.

(*m*) Encyclopædia of Forms and Precedents, Vol. X., p. 217. In the case of registered friendly societies the rules must provide for the settlement of disputes; see title FRIENDLY SOCIETIES, Vol. XV., p. 175.

(*n*) 52 & 53 Vict. c. 49; *Jessop* v. *Huddersfield Industrial Society* (1899), 80 L. T. 598; see further, title FRIENDLY SOCIETIES, Vol. XV., p. 179.

(*o*) As to meaning of "person aggrieved," see *Re Reed, Bowen & Co., Ex parte Official Receiver* (1887), 19 Q. B. D. 174, 177, C. A.; and title FRIENDLY SOCIETIES, Vol. XV., p. 175.

(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 49 (1); *Cox* v. *Hutchinson*, [1910] 1 Ch. 513; and see title FRIENDLY SOCIETIES, Vol. XV., pp. 176, 177.

(*q*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 49 (1); and see title FRIENDLY SOCIETIES, Vol. XV., p. 178.

(*r*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 49 (1); *Re Skipton Industrial Co-operative Society* v. *Prince* (1864), 33 L. J. (Q. B.) 323; *Jessop* v. *Huddersfield Industrial Society* (1899), 80 L. T. 598. See also titles COUNTY COURTS, Vol. VIII., pp. 657—659; FRIENDLY SOCIETIES, Vol. XV., p. 180.

(*s*) As to courts of summary jurisdiction generally, see title MAGISTRATES.

(*t*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39),

Disputes not provided for by rules.

91. Where the rules contain no direction as to disputes, the member or person aggrieved may apply either to the county court or to a court of summary jurisdiction to hear and determine the matter (*a*). The same provision applies where no decision is made on a dispute within forty days after application to the society for a reference under its rules (*b*).

Reference to Chief Registrar.

92. The parties to a dispute in a society may by consent (unless expressly forbidden by the rules) refer the dispute to the Chief Registrar (*c*), who must, with the consent of the Treasury, either himself or by some other registrar, hear and determine the dispute (*d*). He has power also to order the expenses of determination to be paid either out of the society's funds, or by such parties to the dispute as he may think fit (*e*), to administer oaths, to require the attendance of parties and witnesses, and the production of books and documents relating to the matter (*f*).

Effect of determination.

The determination and order of the registrar have the same effect and are enforceable in like manner as a decision made in the manner directed by the rules of the society (*g*).

Penalty.

Where a dispute is referred to the registrar, a person refusing to attend or to produce any document or to give evidence, renders himself liable to a fine not exceeding £5 (*h*).

Case stated.

93. Neither the court nor the registrar can be compelled to state a special case on any question of law. But the court or registrar may at the request of either party state a case for the opinion of the Supreme Court (*i*).

Discovery.

94. The court or registrar may grant to either party such discovery as to documents and otherwise, and such inspection of documents, as might be granted by any court of law or equity (*k*). Discovery on behalf of a society is made by such officer as the court or registrar may determine (*k*).

s. 49 (4). See *Wilkinson* v. *Jagger* (1887), 20 Q. B. D. 423. As to jurisdiction of magistrates in cases relating to industrial societies, compare title FRIENDLY SOCIETIES, Vol. XV., pp. 180 *et seq.*; and see *Re Howarth* v. *Yorkshire Provident Industrial Assurance Co., Ex parte Yorkshire Provident Industrial Assurance Co.* (1894), 58 J. P. 798.

(*a*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 49 (5). See *Jessop* v. *Huddersfield Industrial Society* (1899), 80 L. T. 598 (county court proceedings to enforce arbitrator's award).

(*b*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 49 (5). As to the effect of an alteration of the rules after right to apply to the county court has accrued, see *Ritson* v. *Dobson* (1911), 131 L. T. Jo. 11 (a friendly society case).

(*c*) See Treas. Reg. 1894 (18)—(24). As to the Chief Registrar, see p. 8, *ante*.

(*d*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 49 (2).

(*e*) *I bid.*

(*f*) *I bid.*, s. 49 (3).

(*g*) *I bid.*, s. 49 (2); see p. 28, *ante*.

(*h*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 49 (3), 68.

(*i*) *I bid.*, s. 49 (6). See further, title FRIENDLY SOCIETIES, Vol. XV., p. 184.

(*k*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 49 (6); see also title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 39 *et seq.*

SECT. 3. Remedies.

SUB-SECT. 2.—*Recovery of Debts from Members.*

Recovery of money payable by members.

95. Money payable to a registered society by a member (*l*) is a debt, and recoverable as such by the society in the county court of the district where the society has its office, or of the district where the member resides. The choice of court lies with the society (*m*). The debt is recoverable though it exceeds in amount a debt recoverable under the ordinary jurisdiction of a county court (*n*).

Lien on shares, and set-off.

96. A registered society has a lien on the shares of any member for any debt due to it by him, and may set off any sum credited to the member in or towards the payment of the debt (*o*). So long as a registered co-operative society is carrying on business, it is not precluded from exercising *bonâ fide* and without fraudulent intent such right of "set-off" (*p*). The expression "set-off" is not used in the strict legal sense, but more in the business or accountant's sense as indicating that the society may deduct or write off from the sum credited the amount of the member's debt (*q*).

SUB-SECT. 3.—*Inspection of Affairs.*

Inspection of affairs.

97. The registrar may on the application of one-tenth of the members of a registered society, or of 100 members in the case of a society exceeding 1,000 members, and with the consent of the Treasury, appoint an inspector, or more than one, to examine into and report on the affairs of the society (*r*). The court will not interfere with the discretion of the registrar as to the appointment of an inspector with the consent of the Treasury (*a*).

Application for.

The registrar may require the application to be supported by evidence that the applicants have good reason for requiring an inspection. Such notice must be given to the society as the registrar directs (*b*).

Costs.

Before appointing an inspector the registrar may require the

(*l*) Including a person who had ceased to be a member at the time of action brought (*Gwendolen Freehold Land Society* v. *Wicks*, [1904] 2 K. B. 622).

(*m*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 23 (1).

(*n*) *Gwendolen Freehold Land Society* v. *Wicks*, *supra*.

(*o*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 23 (2).

(*p*) *Re Gwawr-y-Gweithyr Industrial and Provident Society*, *Dovey* v. *Morgan*, [1901] 2 K. B. 477.

(*q*) *Ibid.*, *per* Lord ALVERSTONE, C.J., at p. 482. Such a member is not a creditor within the meaning of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 210 (*Re Gwawr-y-Gweithyr Industrial and Provident Society*, *Dovey* v. *Morgan*, *supra*, *per* Lord ALVERSTONE, C.J., at p. 482 ; and see title COMPANIES, Vol. V., p. 544).

(*r*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 50 (1). For form of application and of statutory declaration to accompany it, see Treas. Reg. 1894 (25), Forms W and X. As to inspection of books by order of the registrar, see p. 16, *ante*. As to whether this section applies to a society being wound up, see title COMPANIES, Vol. V., p. 560. The appointment of inspectors must be in Form Y (Treas. Reg. 1894 (27)), or as near thereto as circumstances may allow.

(*a*) *Professional and Civil Service Supply Association, Ltd.* v. *Dougal* (1896), cited, Report of Chief Registrar, 1897.

(*b*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 50 (2).

SECT. 3. Remedies.

applicants to give security for the costs (*c*). The registrar may order the costs to be paid by the applicants, the society, or by the members or officers or former members or officers (*d*).

Evidence.

The inspector may require the production of the books, accounts, securities, and documents of the society; and may examine on oath its officers, members, agents and servants (*e*).

SUB-SECT. 4.—*Offences, Penalties, and Legal Proceedings.*

Neglect to give notices, returns etc.

98. Failure by a society to give any notice, send any return or document, or to do or allow to be done any act or thing which is required by the Act (*f*), is a statutory offence. Similarly it is an offence for a society wilfully to neglect or refuse to do any act or to furnish any information required for the purposes of the Act (*g*) by the registrar or other person authorised by the Act (*g*), or to do anything forbidden by the Act (*g*), or wilfully to make or furnish false or insufficient returns or information (*h*), or, for a society which has any withdrawable share capital, to carry on the business of banking, or, for a society lawfully carrying on such business, not to keep conspicuously hung up the requisite statement (*i*), or to make any payment of withdrawable capital contrary to the statutory provisions (*k*). The penalty for the offences above mentioned is a fine not exceeding £5 (*l*).

Neglect to comply with the provisions of the Act.

Liability of officer.

99. Where a society is guilty of an offence under the Act (*m*), every officer who is bound by the rules to fulfil the duty whereof the offence is a breach is deemed guilty of the offence. If there be no such officer, every member of the committee is deemed guilty, unless that member is proved to have been ignorant of or to have attempted to prevent the commission of the offence (*m*). Every offence, if continued, constitutes a new offence in every week during which the default continues (*n*).

Illegal possession or misappropriation.

100. Any person (*o*) who by false representation or imposition obtains possession of any real or personal property (including books and papers (*p*)) belonging to a society, or having the same in his possession dishonestly (*q*) withholds or misapplies them, is

(*c*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 50 (3).
(*d*) *Ibid.*, s. 50 (4).
(*e*) *Ibid.*, s. 50 (5).
(*f*) *Ibid.*, s. 62 (1). Other offences have already been referred to in this title (see, *e.g.*, pp. 5, 13, 16, 29, *ante*).
(*g*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39) s. 62 (2).
(*h*) *Ibid.*, s. 62 (3).
(*i*) As to such statement, see *ibid.*, s. 19 (2), Sched. III.
(*k*) *Ibid.*, s. 62 (4).
(*l*) *Ibid.*, s. 68.
(*m*) *Ibid.*, s. 63.
(*n*) *Ibid.* See *Harpin* v. *Sykes* (1885), 49 J. P. 148.
(*o*) As to who are included under the expression "person" in the corresponding provision (s. 87 (3)) of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), see title FRIENDLY SOCIETIES, Vol. XV., pp. 170, 186.
(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 79.
(*q*) See *Scott* v. *Wilson* (1893), 9 T. L. R. 492; *Barrett* v. *Markham* (1872), L. R. 7 C. P. 405.

SECT. 3. Remedies.

liable on summary conviction (*r*) to a fine not exceeding £20 and costs, and to be ordered to deliver up all such property, or to repay all such moneys applied improperly. In default, he may be imprisoned with or without hard labour for any time not exceeding three months (*s*).

Who may institute proceedings.

The proceedings may be taken by the society, or by any member authorised by it or by the committee, or by the Central Office or registrar (*a*). The special procedure above mentioned does not prevent such an offender being proceeded against by way of indictment, if not previously convicted of the same offence under the Act (*b*).

Falsifying balance sheet.

101. The Act (*c*) imposes a fine not exceeding £50 for the offence of falsifying the balance sheet of any registered society, or any contribution or collecting book or any document.

Offences in libraries.

102. The penalty imposed for offences in libraries maintained by registered societies is a fine recoverable on summary conviction not exceeding 40*s.* (*d*).

Recovery of penalties.

103. Fines imposed by the Act (*e*), or by any regulations made under it, are recoverable in a court of summary jurisdiction, at the suit of the registrar or of any person aggrieved. Fines imposed by the rules of a registered society are recoverable at the suit of the society.

Appeals.

104. An appeal lies to quarter sessions from any order or conviction made by a court of summary jurisdiction under the Act (*f*).

How a society sues.

105. A registered society may sue and be sued in its corporate name (*g*). An unregistered society may sue or be sued by representative members thereof (*h*).

(*r*) As to summary conviction generally, see title MAGISTRATES.

(*s*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 64.

(*a*) *I bid.* As to the Central Office and registrar, see p. 8, *ante.*

(*b*) 56 & 57 Vict. c. 39, s. 64. See also title FRIENDLY SOCIETIES, Vol. XV., p. 189.

(*c*) 56 & 57 Vict. c. 39, s. 65. As to illegal payments of withdrawable capital, see p. 5, *ante;* as to omission to use the name of a registered society, see p. 13, *ante;* as to delivery of untrue rules and falsification and non-delivery of annual return, see p. 16, *ante.*

(*d*) Libraries Offences Act, 1898 (61 & 62 Vict. c. 53), ss. 2, 3.

(*e*) 56 & 57 Vict. c. 39, s. 69. Compare title FRIENDLY SOCIETIES, Vol. XV., pp. 188, 190, 191. As to courts of summary jurisdiction generally, see title MAGISTRATES.

(*f*) 56 & 57 Vict. c. 39, s. 70 (1).

(*g*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 21. See *Linton* v. *Blakeney Joint Co-operative Industrial Society* (1865), 3 H. & C. 853; *Queensbury Industrial Society* v. *Pickles* (1865), L. R. 1 Exch. 1, decided under the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87). Appearance should be entered in the registered name as for a corporate body. As to parties to proceedings generally, see title PRACTICE AND PROCEDURE.

(*h*) See *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426; compare *Toutill* v. *Douglas* (1863), 33 L. J. (Q. B.) 66. Appearance may be entered by the treasurer, secretary, or one or more of the other officers.

Part VII.—Amalgamation, Transfer, and Conversion into a Company.

SECT. 1.—*Amalgamation and Transfer of Engagements.*

SECT. 1. Amalgamation and Transfer of Engagements.

106. Two or more registered societies may, by special resolution of both or of all such societies, amalgamate and become one society with or without any dissolution or division of the funds of such societies or either of them (*i*).

Amalgamation.

The property of such societies vests in the amalgamated society without the necessity of any form of conveyance other than that contained in the special resolution amalgamating the societies (*k*).

107. Any registered society may, by special resolution, transfer its engagements to any other registered society which may undertake to fulfil such engagements (*l*).

Transfer of engagements.

108. An amalgamation or transfer of engagements does not prejudice the rights of a creditor of any society concerned (*m*).

Position of creditor.

SECT. 2.—*Conversion into a Company.*

109. A registered society may, by special resolution (*n*), determine to convert itself into a limited company under the Companies (Consolidation) Act, 1908 (*o*), or to amalgamate with, or transfer its engagements to, any such company (*p*).

Conversion, amalgamation, or transfer.

(*i*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 53 (1). Every application to register a special resolution for the amalgamation of societies must be made by each of the societies in duplicate in Form AC, and must be sent to the Central Office, accompanied by statutory declarations from officers of each society in Form AB. No acknowledgment of registry must be given to either society until special resolutions in the like terms have been submitted for registry by the other or others (Treas. Reg. 1894 (31)). See Encyclopædia of Forms and Precedents, Vol. X., p. 219.

(*k*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 53 (1).

(*l*) *Ibid.*, s. 53 (2). Every application to register a special resolution for the transfer of the engagements of a society to another must be in duplicate in Form AD, and must be sent to the Central Office accompanied by statutory declarations in Forms AB and AE (Treas. Reg. 1894 (32)).

(*m*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 57.

(*n*) For form of special resolution, compare the Friendly Societies Form, Encyclopædia of Forms and Precedents, Vol. VI., p. 64. An application to register a special resolution for converting a society into a company must be in triplicate in Form AF (Treas. Reg. 1894 (33)), and must be sent to the Central Office, accompanied by a statutory declaration in Form AB (Treas. Reg. 1894(33)). An application to register a special resolution for amalgamation with a company or for transfer of engagements to a company, must be sent to the Central Office in duplicate in Form AC or AD as the case may be, with the necessary modifications to suit the facts, and must be accompanied by statutory declarations in Forms AB and AG (Treas. Reg. 1894 (34)). Where the special resolution is for conversion into, amalgamation with, or transfer of all the engagements of a society to, a company, the following words must be written at the foot:—"The registry of the society is hereby cancelled [*or* directed to be cancelled] Chief Registrar" (Treas. Reg. 1894 (36)).

(*o*) 8 Edw. 7, c. 69, ss. 3, 5. See title COMPANIES, Vol. V., p. 65. Compare the Companies (Converted Societies) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 23), which applies only to friendly societies.

(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 54 (1).

SECT. 2. Conversion into a Company.

Special resolution.

110. If a special resolution for converting a registered society into a limited company contains the particulars required by the Companies (Consolidation) Act, 1908 (*q*), to be contained in the memorandum of association of a company, and a copy of it has been registered at the Central Office, a copy of the resolution, sealed and stamped by the Central Office, has the same effect as a memorandum of association duly signed and attested under the Companies (Consolidation) Act, 1908 (*r*).

Cancellation of registry.

111. Where a society is registered as, or amalgamates with, or transfers all its engagements to, a limited company, the registry of the society under the Act becomes void, and must be cancelled (*s*).

Effect of conversion into company.

112. The registration of a society as a company does not affect any right or claim subsisting against, or any penalty incurred by, the society; they may be enforced against the society exactly as if it had not been converted into a company, and they have priority over all other rights or claims against or liabilities of the company (*t*).

Part VIII.—Dissolution and Suspension of Registry.

SECT. 1.—*Winding Up.*

By order or by resolution.

113. A registered society may be dissolved by an order to wind it up, or by a resolution for winding up, made as is directed in regard to limited companies (*u*). It is incumbent upon a registered society to register at the registry of friendly societies (*v*) an extraordinary resolution for winding up within fifteen days of its being passed (*a*).

(*q*) 8 Edw. 7, c. 69, ss. 3, 5. See title COMPANIES, Vol. V., p. 65.

(*r*) 8 Edw. 7, c. 69. See Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 54 (2); and title COMPANIES, Vol. V., p. 80.

(*s*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 54 (3); see Treas. Reg. 1894 (33), (34).

(*t*) *Ibid.*

(*u*) Under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 267, 268, the provisions of which are applicable to any such order or resolution, except that the term "registrar" means the registrar for the purpose of the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39). See also *Re Ruddington Land*, [1909] 1 Ch. 701; *Re Ferndale Industrial Co-operative Society*, [1894] 1 Q. B. 828; *Re London and Suburban Bank*, [1892] 1 Ch. 604; and title COMPANIES, Vol. V., p. 390. Compare *Re Chatham Co-operative Industrial Society* (1864), 33 L. J. (CH.) 737; *Re National Industrial and Provident Society* (1861), 30 L. J. (CH.) 940; *Re Rotherhithe etc. Industrial Society* (1862), 32 Beav. 57. As to winding up an unregistered branch of a registered society, see *Re Londonderry Equitable Co-operative Society, Ltd.*, [1910] 1 I. R. 69; and title FRIENDLY SOCIETIES, Vol. XV., p. 203. As to winding up in the county court, see *Henderson* v. *Bamber* (1865), 19 C. B. (N. S.) 540; and title COMPANIES, Vol. V., pp. 392, 393.

(*v*) See p. 8, *ante*; and title FRIENDLY SOCIETIES, Vol. XV., p. 129.

(*a*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 58 (a); Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 69 (1), 70 (1).

Limitation of liability of past or present members.

114. Where a registered society is wound up in pursuance of an order or resolution, the liability of a present or past member of the society, whether an individual, a society, or a company, to contribute for payment of the debts and liabilities of the society, the expenses of winding up and the adjustment of the rights of contributories amongst themselves, is qualified as follows: (1) No party having ceased to be a member for one year or upwards prior to the commencement of the winding up is liable to contribute; (2) no party is liable in respect of any debt or liability contracted after such party ceased to be a member; (3) no party, not being a member, is liable, unless, in the opinion of the court, the contributions of existing members are insufficient to satisfy the just demands of the society; (4) no contribution is demandable from any party exceeding the amount, if any, unpaid on the shares in respect of which such party is liable as a past or present member; and (5) a party is deemed to have ceased to be a member in respect of any withdrawable share withdrawn, from the date of the notice or application for withdrawal (*b*).

Liability in respect of shares payable by monthly subscriptions.

115. Where the rules of a registered society provide that its capital shall be raised by shares of a fixed amount, payable by monthly subscriptions—(1) a member is liable, on a winding up, to pay the difference between the amount standing to his credit and the nominal amount of his shares; (2) the withdrawal by a member of part of his subscription merely increases the contingent liability in respect of his shares; (3) death does not terminate his liability, but his estate remains liable to contribute, notwithstanding that the death took place a year or more prior to the winding-up order; and (4) anyone who has contributed one monthly subscription only with a view to obtaining an advance from the society remains liable in respect of his shares, whether the amount advanced has been repaid before or after the date of the winding-up order (*c*).

Jurisdiction on application for compulsory winding up.

116. Where a petition is presented to wind up a registered society compulsorily during the course of a voluntary liquidation, the court has jurisdiction (1) to make an order for compulsory winding up; or (2) to order the continuance of the voluntary winding up under supervision; or (3) to dismiss the petition, and allow the voluntary winding up to continue without supervision (*d*).

It is not "just and equitable" to wind up a society under the Companies (Consolidation) Act, 1908 (*e*), merely because the society can only carry on business by suspending the right of withdrawal of share capital, and such suspension is authorised by the rules (*f*).

(*b*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 60. See *Burton* v. *Tannahill* (1856), 5 E. & B. 797; *Re Sheffield and Hallamshire etc. Co-operative and Industrial Society, Fountain's Case, Swift's Case* (1865), 4 De G. J. & Sm. 699; *Dean* v. *Mellard* (1863), 15 C. B. (N. S.) 19, cases concerning the liability of members under repealed statutes regulating industrial and provident societies.

(*c*) *Re United Service Share Purchase Society, Ltd.*, [1909] 2 Ch. 526.

(*d*) *Re Belfast Tailors' Copartnership*, [1909] 1 I. R. 49; see *Re Friendly Protestant Partnership Loan Fund Co., Ex parte Hall*, [1895] 1 I. R. 1.

(*e*) 8 Edw. 7, c. 69.

(*f*) *Re Horsham Industrial and Provident Society, Ltd.* (1894), 70 L. T. 801.

SECT. 2. **Dissolution by Instrument.**

SECT. 2.—*Dissolution by Instrument.*

Consent of three-fourths of members necessary. Contents.

117. A society may also be dissolved by the consent of three-fourths of the members testified by their signatures to an instrument of dissolution (*g*). The instrument must set forth—(1) the liabilities and assets of the society in detail, (2) the number of members and the nature of their interest in the society, (3) the claims of any creditors and the provision to be made for their payment, and (4) the intended appropriation or division of the funds and property of the society, unless in the instrument of dissolution the same is stated to be left to the award of the Chief Registrar (*h*).

Statutory declaration in support.

A statutory declaration made by three members and the secretary that the provisions of the Act (*i*) have been complied with must be sent to the registrar with the instrument of dissolution. It is a misdemeanour knowingly to make a false or fraudulent declaration (*k*).

Alterations.

Alterations in the instrument of dissolution may be made with the consent of three-fourths of the members, testified by their signatures (*l*).

Registration.

The instrument of dissolution and all alterations in it must be registered in the same way as rules are registered. They are binding on all the members of the society (*m*).

Notice of dissolution.

118. The registrar must cause a notice of dissolution (*n*) to be advertised at the expense of the society in the *London Gazette* and in some local paper. Unless within three months from the date of the *London Gazette* in which the advertisement appears county court proceedings are commenced by a member or other person interested in or having any claim on the funds of the society to set aside the dissolution, and the dissolution is set aside accordingly, the society stands dissolved as from the date of the advertisement. In such case the requisite consents to the instrument of dissolution are considered to have been duly obtained without proof of the signatures (*o*).

(*g*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 58 (b). See also title FRIENDLY SOCIETIES, Vol. XV., pp. 197 *et seq.*

(*h*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 61 (a). For form of instrument, see Encyclopædia of Forms and Precedents, Vol. X., p. 222, and official Form AH prescribed by Treas. Reg. 1894 (38). The instrument must be signed in duplicate and accompanied by the official Form AI, and a sufficient sum to cover the costs of advertisement in the *London Gazette* and a local paper; compare title BUILDING SOCIETIES, Vol. III., pp. 392 *et seq.*

(*i*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39).

(*k*) *Ibid.*, s. 61 (c). The statutory declaration must be in Form AI (Treas. Reg. 1884 (38)).

(*l*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 58 (b), 61 (b). Alterations in the instrument of dissolution must be signed, declared to, and registered in the same manner as the instrument itself (Treas. Reg. 1894 (40)).

(*m*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 61 (d). The acknowledgment of registry must be in Form AK (Treas. Reg. 1894 (39)). As to registry of rules, see p. 9, *ante*.

(*n*) The advertisement of dissolution by instrument must be in Form AL (Treas. Reg. 1894 (41)).

(*o*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39),

SECT. 2. Dissolution by Instrument.

Notice of any proceedings to set aside a dissolution must be sent by the person taking proceedings, to the Central Office not less than seven days before the proceedings are commenced. Similarly the society must give notice of any order setting aside the dissolution within seven days after it is made (*p*).

Notice of proceedings to set dissolution aside.

119. On the execution of an instrument of dissolution of a registered society the property of the society is subject to a trust for appropriation and division in accordance with the provisions of the instrument or with the award of the registrar (*q*).

SECT. 3.—*Cancellation or Suspension of Registry.*

Grounds for cancellation.

120. When the registrar is satisfied that (1) the number of members of a society has been reduced to less than seven, or (2) that an acknowledgment of registry has been obtained by fraud or mistake, or (3) that the society has ceased to exist, he may cancel the registry by writing under his hand or seal (*r*), and this he may do, if he thinks fit, at the request of the society (*s*).

Grounds for cancellation or suspension.

121. When the registrar is satisfied that (1) the society exists for an illegal purpose, or (2) has wilfully and after notice from the registrar violated any of the provisions of the Act, he may, with the approval of the Treasury, either cancel the registry (*t*), or suspend it for any period not exceeding three months (*u*), and he may also from time to time with the like approval renew the suspension for a similar period (*v*).

s. 61 (e). The effect of this provision is that no division of funds can take place till three months after the date of the advertisement. Every award of the Chief Registrar for distribution of funds must be in Form AP (Treas. Reg. 1894 (42)).

(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 61 (f). The notice of a proceeding to set aside a dissolution must be in Form AY, and the notice of an order setting aside a dissolution in Form AZ (Treas. Reg. 1894 (43)).

(*q*) *Re Ruddington Land*, [1909] 1 Ch. 701, where a trustee (the person nominated by the instrument of dissolution to realise the assets) was appointed in the place of the dissolved society.

(*r*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 9 (1) (a). The cancelling of registry must be in Form H (Treas. Reg. 1894 (9)).

(*s*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 9 (1) (b). Every request to cancel registry must be sent to the registrar in Form F (Treas. Reg. 1894 (6)), and must name some newspaper circulating in or about the locality in which the registered office of the society is situated, wherein it is desired that the cancellation of registry shall be published, and shall be accompanied by the sum requisite to defray the expenses of publication and by the further sum of 5*s*. 6*d*. for publication of such cancellation in the *London Gazette* (Treas. Reg. 1894 (6)). The advertisement of cancellation or suspension must be in Form J (Treas. Reg. 1894 (10)).

(*t*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 9 (1) (c). As to meaning of "illegal purpose," see *Swaine* v. *Wilson* (1889), 24 Q. B. D. 252, C. A.; *Warburton* v. *Huddersfield Industrial Society*, [1892] 1 Q. B. 817, C. A. The cancellation must be in Form H (Treas. Reg. 1894 (9)).

(*u*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 9 (2). The suspension or renewal of suspension of registry must be in Form I (Treas. Reg. 1894 (9)).

(*v*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39),

SECT. 3.
Cancellation or Suspension of Registry.

Notice required.

Appeal.

122. Not less than two months' notice specifying the grounds of a proposed cancellation or suspension must be given by the registrar to the society, except where the cancellation is effected at the request of the society. Notice of the cancellation or suspension must be advertised in the *London Gazette* and in some newspaper in the locality where the registered office of the society is situate (*a*).

An appeal lies to the High Court from a cancellation, or from a suspension if the latter is renewed after three months (*b*).

Effect of cancellation or suspension.

123. A society, after the cancellation or during the suspension of its registry, absolutely ceases to enjoy the privileges of a registered society, but without prejudice to any liability incurred by the society, and any such liability can be enforced as if no cancellation or suspension had taken place (*c*).

s. 9 (2). Where application is made to cancel registry under the compulsory powers of the registrar, the registrar may require such applications to be made in duplicate in such form, and to be supported by such statutory declaration as the Chief Registrar may direct. He must transmit one copy of such application to the Treasury for its consent (Treas. Reg. 1894 (7)).

(*a*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 9 (3). Notice before cancelling or suspension of registry must be in Form G (Treas. Reg. 1894 (8)).

(*b*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 9 (4).

(*c*) *Ibid.*, s. 9 (5). It becomes an unregistered society, as to which see p. 19, *ante*.

INDUSTRIAL SCHOOLS.

See EDUCATION.

INEBRIATES.

See CRIMINAL LAW AND PROCEDURE; INTOXICATING LIQUORS.

INFANTS AND CHILDREN.

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Part I.—Definitions.

SECT. 1.—*Infants.*

Infants in English law.

124. Infancy is, in English law, the term applied to the period of life, whether in males or females, which precedes the completion of the twenty-first year, and persons under that age are called infants (*a*). The age of twenty-one years is called full age (*b*), and anyone who has attained full age is competent to do all that the law requires or enables a person in his or her position to do, except in the cases of lunatics, idiots, and persons under disability on account of conviction for crime, and, to a certain extent, married women. But infants have a very limited power of legal action, and their interests are carefully protected by the law, since they are regarded as of immature intellect and imperfect discretion (*c*). The term "infant" is derived from Roman law, in which, however, it was used more in its etymological sense, and was applied only to

(*a*) The common law knows of no distinction between infants of tender and of mature years (*Morgan* v. *Thorne* (1841), 7 M. & W. 400, *per* PARKE, B., at p. 408). But see notes (*d*), (*e*), p. 44, *post*.

(*b*) Co. Litt. 78 b.

(*c*) 2 Co. Inst. 291; 3 Co. Inst. 4; 1 Roll. Abr. 731; 4 Bac. Abr., tit. Infancy and Age (G.), (I.), 7th ed., pp. 348, 354, 360; *Slator* v. *Trimble* (1861), 14 I. C. L. R. 342, *per* HAYES, J., at p. 356.

SECT. 1. Infants.

persons under seven years of age (*d*). The use of the word in this sense is in English law retained only in the Probate, Divorce, and Admiralty Division of the High Court, where, in the case of the appointment of a guardian for the purpose of taking out administration *durante minore ætate*, a distinction is made between infants and minors, the former being under seven years and the latter between seven years and twenty-one years (*e*).

Full age.

125. Full age is attained at the close of the day preceding the twenty-first anniversary of his birth (*f*), and, inasmuch as the law does not take notice of fractions of a day (*g*), a person is capable of doing a legal act at any time on that day (*h*).

Alteration of status.

126. An infant can, by Act of Parliament, be adjudged of full age before he attains the age of twenty-one years (*i*). His status of infancy cannot be changed in any other way, nor can he alter it by adopting a proceeding which would be valid if he were of full age (*k*).

The Sovereign.

127. The general rule as to the attainment of full age at twenty-one years has one exception in the case of the Sovereign, who is considered to attain full age at the age of eighteen years (*l*).

SECT. 2.—*Children.*

Statutory definitions of "child" and "young person."

128. The word "child" is usually employed, instead of "infant," to denote a person of immature years, in statutes passed for the protection of such persons or dealing with their criminal acts, the term being thus applied to persons of varying ages, and contrasted with the expression "young person," which is used to denote a somewhat more advanced age. Many of these statutes have been repealed and their provisions consolidated by the Children Act, 1908 (*m*), in which a "child" is defined generally as a person

Generally.

(*d*) The word *infans* means "unable to speak" (Sandars, Institutes of Justinian, 8th ed., pp. 69, 347). The Roman law also drew certain distinctions between persons past the age of infancy, but below or above the age of puberty, which was fixed by Justinian at fourteen for males and twelve for females (*ibid.*, pp. 70, 71, 347, 348; 4 Bl. Com. 22). As to the distinctions in English law between the criminal capacity of infants under seven years of age and between that age and fourteen years and above fourteen, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 239, 240.

(*e*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 197. See also p. 50, *post*.

(*f*) 1 Bl. Com. 463; *Anon.* (1699), 1 Ld. Raym. 480, *per* HOLT, C.J.; *Anon.*, cited in *Fitzhugh* v. *Dennington* (1704), 2 Ld. Raym. 1094, *per* HOLT, C.J., at p. 1096. (The use of the masculine pronoun throughout this title is intended to include females unless the context forbids.)

(*g*) *Lester* v. *Garland* (1808), 15 Ves. 248, *per* GRANT, M.R., at p. 257; see also title TIME.

(*h*) Thus a person born on 1st January, 1889, could have legally acted at the first instant of 31st December, 1909 (4 Bac. Abr., tit. Infancy and Age (A.), 7th ed., p. 335; *Herbert* v. *Turball* (1663), 1 Keb. 589; *Nichols* v. *Ramsel* (1677), 2 Mod. Rep. 280, 281; *Anon.* (1704), 1 Salk. 44).

(*i*) 4 Co. Inst. 36.

(*k*) *Re Jones, Ex parte Jones* (1881), 18 Ch. D. 109, 122, 123, C. A. (where an infant filed a petition in bankruptcy).

(*l*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 375, 376; and p. 55, *post*.

(*m*) 8 Edw. 7, c. 67.

under the age of fourteen years, and a "young person" as above the age of fourteen years and under the age of sixteen years (*a*). But there are other definitions in statutes which are still unrepealed (*b*).

In the Summary Jurisdiction Acts.

Under the Summary Jurisdiction Acts (*c*) a "child" means a person who, in the opinion of the court before whom he is brought, is under the age of twelve years, and a "young person" means one who, in the opinion of the court before whom he is brought, is above twelve and under sixteen years of age. The lowest permissible age for the sale of intoxicating liquors to children is fourteen years (*d*); but the provisions of the Prevention of Cruelty to Children Act, 1904 (*e*), apply to persons under sixteen years (*f*).

Child as a term of relationship.

129. The expression "child" has also been defined by statute or judicial decision in respect of the relationship borne to certain persons.

Under the Fatal Accidents Act, 1846.

As regards the recovery of damages for death caused by negligence for the benefit of, amongst others, children of the deceased, the word "child" includes, besides a son and daughter, a grandson and granddaughter and stepson and stepdaughter (*g*).

Under the Workmen's Compensation Act, 1906.

In the Workmen's Compensation Act, 1906 (*h*), the dependants of a workman to whom compensation is payable in case of his death by an accident within the purview of the Act include, if they were dependent on his earnings, an illegitimate child and grandchild (*i*).

In deeds and wills.

In the interpretation of deeds and wills the expression "child" means a legitimate child (*k*), unless either (1) the circumstances render it impossible that it can refer to such a child, or (2) the language of the will shows that the testator intended to use the expression in a different or more extended sense (*l*). In either of

(*a*) 8 Edw. 7, c. 67, s. 131; see pp. 158 *et seq.*, *post*.

(*b*) See titles AGRICULTURE, Vol. I., p. 277; EDUCATION, Vol. XII., pp. 32, 55; FACTORIES AND SHOPS, Vol. XIV., pp. 445, 446, 487; and p. 152, *post*. As to definition of "boy" and "girl" for the purpose of employment in mines, see pp. 154, 156, *post*. As to limits of age for other employments, see pp. 150, 152, 153, 157, *post*.

(*c*) See title MAGISTRATES; and Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 49. As to children in reference to the commission of crime and criminal proceedings generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 239 *et seq.*; and as to offences in respect of children, see *ibid.*, pp. 552, 623, 626.

(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 68.

(*e*) 4 Edw. 7, c. 15.

(*f*) *Ibid.*, s. 2 (b), (c), (d).

(*g*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 5; see title NEGLIGENCE.

(*h*) 6 Edw. 7, c. 58.

(*i*) *Ibid.*, s. 13, including a posthumous illegitimate child (*Orrell Colliery Co.* v. *Schofield*, [1909] A. C. 433). See title MASTER AND SERVANT.

(*k*) *Wilkinson* v. *Adam* (1813), 1 Ves. & B. 422, *per* Lord ELDON, L.C., at p. 462. In this respect a deed must be construed upon the same principles as a will (*Ebbern* v. *Fowler*, [1909] 1 Ch. 578, C. A., *per* COZENS-HARDY, M.R., at pp. 585, 586). See also titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 438; WILLS.

(*l*) *Hill* v. *Crook* (1873), L. R. 6 H. L. 265, *per* Lord CAIRNS, at pp. 282, 283; *Ebbern* v. *Fowler*, *supra*.

SECT. 2. Children.

these cases it may mean or include an illegitimate child (*m*), or a stepchild (*n*), or a grandchild (*o*).

Part II.—Civil and Legal Capacity and Disabilities.

SECT. 1.—*General Principles.*

Inability of infants to discharge duties or prejudice their interests by legal acts.

130. An infant, being regarded as of immature intelligence and discretion (*a*), is under a general incapacity to exercise the rights of citizenship or perform civil duties (*b*); or to hold public or private offices or perform the duties incidental to them (*c*). For the same reason he is not permitted by law to do anything prejudicial to his own interests (*d*). In accordance with this principle his capacity to bind himself by contract is limited to certain particular cases in which it is clearly for his benefit that he should be permitted to do so (*e*); other contracts by him being either voidable or, if manifestly prejudicial to his interests, absolutely void (*f*). The same principle regulates an infant's capacity to acquire (*g*) and dispose of (*h*) property, and his incapacity in reference to legal proceedings instituted on his behalf or against him (*i*).

Liability for fraudulent and wrongful acts.

131. An infant who is of an age at which he is capable of distinguishing between right and wrong is liable for the consequences of his own fraud and for other wrongful or criminal acts (*k*).

Infants under the special protection of the Sovereign.

132. Infants have always been treated as specially under the protection of the King, who, as *parens patriæ*, had the charge of

(*m*) *Wilkinson* v. *Adam* (1813), 1 Ves. & B. 422; *Hill* v. *Crook* (1873), L. R. 6 H. L. 265; and see title WILLS.

(*n*) *Re Jeans, Upton* v. *Jeans* (1895), 72 L. T. 835.

(*o*) *Reeves* v. *Brymer* (1799), 4 Ves. 692, 698; *Fenn* v. *Death* (1856), 23 Beav. 73; *Berry* v. *Berry* (1861), 3 Giff. 134.

(*a*) See p. 43, *ante*.

(*b*) *Grange* v. *Tiving* (1665), O. Bridg. 107, *per* BRIDGMAN, C.J., at p. 117; and see pp. 47, 48, *post*.

(*c*) See p. 47, *post*.

(*d*) Co. Litt. 171 b; Com. Dig., tit. Enfant (C. 2). The law treats all acts of an infant which are for his benefit on the same footing as those of an adult, but does not permit him to be prejudiced by anything to his disadvantage (*Basset's Case* (1557), 2 Dyer, 136 a, 137 a). An infant, owing to his want of judgment and capacity, is disabled from binding himself, except where it is for his benefit (*Compton* v. *Collinson* (1788), 2 Bro. C. C. 377, *per* BULLER, J., at p. 387).

(*e*) See pp. 63 *et seq.*, *post*.

(*f*) *Ibid.*

(*g*) See pp. 75 *et seq.*, *post*.

(*h*) See pp. 78 *et seq.*, *post*. An infant has no disposing mind (*Sockett* v. *Wray* (1793), 4 Bro. C. C. 483, *per* ARDEN, M.R., at p. 486). See also title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 360.

(*i*) See pp. 133 *et seq.*, *post*.

(*k*) See pp. 66, 74, 75, *post*. As to the capacity of an infant in regard to crime, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 239, 240; and as to negligence and contributory negligence, see title NEGLIGENCE.

persons not capable of looking after themselves (*l*). This jurisdiction over infants was formerly delegated to and exercised by the Lord Chancellor (*m*); through him it passed to the Court of Chancery (*n*), and is now vested in the Chancery Division of the High Court of Justice (*o*). It is independent of the question whether the infant has any property or not (*p*).

SECT. 2.—*Absolute Disabilities.*

General incapacity to hold public office.

133. With certain exceptions (*q*) an infant cannot hold an office or post of public and pecuniary trust (*r*). Accordingly he cannot act as the clerk of a court where it is a part of the duties to receive money (*s*), nor as a bailiff (*t*) or receiver (*a*). He cannot, if a peer, sit or vote in the House of Lords (*b*), nor is he eligible for the House of Commons (*c*). He cannot be a mayor, alderman, or councillor of a municipal borough (*d*), or of a metropolitan borough (*e*), nor be a chairman or member of a county council (*f*), district council (*g*), or parish council (*h*), nor act as guardian of the poor (*i*).

Incapacity to exercise the franchise.

134. An infant cannot be registered as a voter for nor vote at a parliamentary election (*j*), nor be a burgess of a municipal borough (*k*),

(*l*) Fitz. Nat. Brev. 232; *De Manneville* v. *De Manneville* (1804), 10 Ves. 52, 55; *Re Fitzgerald* (1805), 2 Sch. & Lef. 432, *per* Lord REDESDALE, L.C., at p. 437; *Field* v. *Moore*, *Field* v. *Brown* (1855), 7 De G. M. & G. 691, C. A., *per* TURNER, L.J., at p. 710. See also title CONSTITUTIONAL LAW, Vol. VI., pp. 375, 475.

(*m*) 1 Bl. Com. 463.

(*n*) *Ibid.*; 3 Bl. Com. 427; *Wellesley* v. *Beaufort* (*Duke*) (1827), 2 Russ. 1, *per* Lord ELDON, L.C., at pp. 20, 21; affirmed *sub nom. Wellesley* v. *Wellesley* (1828), 2 Bli. (N. S.) 124, H. L., *per* Lord REDESDALE, at pp. 129, 130; *Field* v. *Moore*, *Field* v. *Brown*, *supra*, at p. 710.

(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34; *Martin* v. *Gale* (1876), 4 Ch. D. 428, *per* JESSEL, M.R., at pp. 431, 432. See pp. 125 *et seq.*, 146 *et seq.*, *post*.

(*p*) *Re A.B., an Infant* (1885), 1 T. L. R. 657; and see note (*g*), p. 105, and p. 126, *post*.

(*q*) See pp. 55, 56, *post*.

(*r*) *Claridge* v. *Evelyn* (1821), 5 B. & Ald. 81, *per* ABBOTT, C.J., at p. 86; *Cuckson* v. *Winter* (1828), 2 Man. & Ry. (K. B.) 313. See also title TRUSTS AND TRUSTEES.

(*s*) *Claridge* v. *Evelyn*, *supra*.

(*t*) *Cuckson* v. *Winter*, *supra*.

(*a*) Co. Litt. 171 b, 172 a; Com. Dig., tit. Enfant (C. 1).

(*b*) 4 Co. Inst. 47.

(*c*) *Ibid.*; and see title PARLIAMENT.

(*d*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 9 (2) (a), 11 (2) (a), 14 (3), 15 (1); and see titles ELECTIONS, Vol. XII., pp. 182, 342, 353; LOCAL GOVERNMENT.

(*e*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (4), (5); see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (1); Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 31 (1), 46 (1); and see title ELECTIONS, Vol. XII., p. 500.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (1), (5) (a); see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 9 (2) (a), 11 (2) (a), 14 (3), 15 (1); and see titles ELECTIONS, Vol. XII., p. 356; LOCAL GOVERNMENT.

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (1); and see title ELECTIONS, Vol. XII., pp. 191, 192, 361—393.

(*h*) *Ibid.*

(*i*) *Ibid.*

(*j*) Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), ss. 20, 27; Representation of the People Act, 1867 (30 & 31 Vict. c. 102), ss. 3—6; Registration Act, 1885 (48 & 49 Vict. c. 15), s. 18, Sched. II., Form No. 1, Part I. (4); and see title ELECTIONS, Vol. XII., p. 139.

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 9 (2) (a); and see title ELECTIONS, Vol. XII., p. 182.

SECT. 2. Absolute Disabilities.

nor vote at an election of councillors of a municipal borough (*l*), or a metropolitan borough (*m*), or of county councillors (*n*), parish councillors (*o*), or district councillors (*p*), or guardians of the poor (*q*).

Service on jury.

An infant is not qualified to serve on a jury (*r*).

Appointment of agent or attorney.

135. An infant cannot generally appoint an agent to act for him, or on his behalf (*s*), nor an attorney (*a*). But an infant has power in certain cases to appoint a guardian to protect his interests and manage his affairs (*b*), and he can authorise an agent to do specific lawful acts on his behalf (*c*). Where the appointment of an agent or attorney is void, any act done by him by virtue of the appointment is also void (*d*).

Prejudicial acts and dispositions.

136. Any act or disposition of an infant which is clearly to his prejudice is void (*e*).

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 11 (1).

(*m*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (5); see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 31 (1).

(*n*) County Electors Act, 1888 (51 & 52 Vict. c. 10), s. 2 (1); Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75; see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 9 (2).

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 44 (1), (2); and see notes (*d*), (*e*), (*f*), p. 47, *ante*.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 23 (3).

(*q*) *Ibid.*, s. 20 (3); and see generally, title ELECTIONS, Vol. XII., pp. 191, 192.

(*r*) Juries Act, 1825 (6 Geo. 4, c. 50), ss. 1, 52; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (1); see *ibid.*, s. 9 (2) (a); and see title JURIES. As to coroners' juries, compare title CORONERS, Vol. VIII., p. 261.

(*s*) *Doe* d. *Thomas* v. *Roberts* (1847), 16 M. & W. 778, *per* PARKE, B., at p. 780; and see title AGENCY, Vol. I., p. 149.

(*a*) Perkins, Profitable Book (or Laws of England), s. 12, p. 3; 4 Bac. Abr., tit. Infancy and Age (I.) 3, 7th ed., pp. 360, 361; *Whittingham's Case* (1603), 8 Co. Rep. 42 b, 45 a; *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794, 1804; *Motteux* v. *St. Aubin* (1777), 2 Wm. Bl. 1133; *Saunderson* v. *Marr* (1788), 1 Hy. Bl. 75; *Ashlin* v. *Langton* (1834), 4 Moo. & S. 719; *Oliver* v. *Woodroffe* (1839), 4 M. & W. 650. But it was held that an infant could appoint an attorney to accept livery of seisin because it was for his benefit (*Rames* v. *Machin* (1609), Noy, 130); and as to his appointing an attorney to take an admittance to copyhold land, see note (*n*), p. 96, *post*. See also, as to the special power of a married woman, whether an infant or not, to appoint an attorney, titles AGENCY, Vol. I., p. 150; HUSBAND AND WIFE, Vol. XVI., p. 384.

(*b*) See pp. 58, 59, *post*.

(*c*) *Ewer* v. *Jones* (1846), 9 Q. B. 623. An apprenticeship deed was held to be sufficiently executed and delivered where the names of the infant apprentice and his father, both being illiterate, were at their request written on it opposite to their seals by a third person, and the infant afterwards delivered it to the master (*R.* v. *Longnor* (*Inhabitants*) (1833), 4 B. & Ad. 647).

(*d*) *Whittingham's Case, supra*; *Raby* v. *Robinson* (1667), 1 Sid. 321; *Stokes* v. *Oliver* (1696), 5 Mod. Rep. 209; *Motteux* v. *St. Aubin, supra*; *Saunderson* v. *Marr, supra*; *Doe* d. *Thomas* v. *Roberts, supra*; see also *Biddle* v. *Dowse* (1827), 6 B. & C. 255.

(*e*) Com. Dig., tit. Enfant (C. 2); 1 Shep. Touch., 8th ed., p. 56, n. (y); *Harvey* v. *Ashley* (1748), 3 Atk. 607, *per* Lord HARDWICKE, L.C., at p. 610; *Compton* v. *Collinson* (1788), 2 Bro. C. C. 377, 387; *Keane* v. *Boycott* (1795), 2 Hy. Bl. 512, 515; *Cooper* v. *Simmons* (1862), 7 H. & N. 707, *per* MARTIN, B., at p. 719; *Slator* v. *Brady* (1863), 14 I. C. L. R. 61, 64, 65. An infant's act is void where there is no apparent benefit or likelihood of a benefit accruing to him from it (*Grange* v. *Tiving* (1665), O. Bridg. 107, 115).

Prejudicial contracts and stipulations.

Accordingly an infant cannot (1) enter into a contract which is manifestly against his interests (*f*); or (2) make, in a contract which would otherwise be binding on him (*g*), a condition or stipulation which is clearly against his interest (*h*).

Other prejudicial acts.

On the same principle an infant cannot give a bill of exchange in the course of his trading (*i*), nor give a bond with a penalty, nor contract a loan (*k*), nor covenant to bind himself as an apprentice, except where such covenant is warranted by the custom of London or other local custom (*l*). Nor can he make a lease of his land without a reservation of rent (*m*), nor grant a rentcharge or annuity (*n*), nor surrender a term of years (*o*). An infant cannot generally give a valid receipt or a valid release of a legal claim (*p*).

Testamentary incapacity.

137. Subject to certain exceptions in favour of soldiers on actual service and sailors at sea (*q*), an infant is incapable of executing a will or making any testamentary appointment or disposition (*r*), although in certain cases he may, by written nomination, dispose of sums of limited amount belonging to him (*a*).

(*f*) See p. 63, *post*.

(*g*) As to these contracts, see pp. 64, 67 *et seq.*, *post*.

(*h*) See pp. 64, 70, 72, 73, *post*.

(*i*) Com. Dig., tit. Enfant (C. 2); *Williams* v. *Harrison* (1690), Carth. 160. See also title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 490, 491, 494.

(*k*) Co. Litt. 172 a; Com. Dig., tit. Enfant (C. 2); *Ayliff* v. *Archdale* (1602), Cro. Eliz. 920; *Darby* v. *Boucher* (1693), 1 Salk. 279; *Ellis* v. *Ellis* (1697), 5 Mod. Rep. 368; *Earle* v. *Peale* (1712), 1 Salk. 386. See also title BONDS, Vol. III., p. 83. As to necessaries, see pp. 67 *et seq.*, *post*.

(*l*) *Walker* v. *Nicholson* (1599), Cro. Eliz. 652; *Whittingham* v. *Hill* (1618), Cro. Jac. 494; *Gylbert* v. *Fletcher* (1630), Cro. Car. 179. As to how far a contract of apprenticeship is binding on an infant, see pp. 69 *et seq.*, *post*.

(*m*) Com. Dig. tit., Enfant (C. 2); 1 Roll. Abr., tit. Enfants D., p. 729; see note (*b*), p. 99, *post*.

(*n*) Com. Dig., tit. Enfant (C. 2); *Thompson* v. *Leach* (1690), 3 Mod. Rep. 301, 310.

(*o*) 1 Roll. Abr., tit. Enfants B., p. 729; *Lloyd* v. *Gregory* (1638), Cro. Car. 501; *Thompson* v. *Leach*, *supra*.

(*p*) Co. Litt. 264 b; 2 Shep. Touch. 334, n.; *Overton* v. *Banister* (1844), 3 Hare, 503, *per* WIGRAM, V.-C., at p. 506. But as to a release by an infant who pretends that he is of age, see p. 66, *post*; and as to a receipt by an infant married woman under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42, see note (*u*), p. 88, *post*. A release or acquittance given by a person immediately after attaining full age without the assistance of independent advice is liable to be set aside (*Hicks* v. *Hicks* (1744), 3 Atk. 274, 275; *Steadman* v. *Palling* (1747), 3 Atk. 423; *Revett* v. *Harvey* (1823), 1 Sim. & St. 502; *Kilbee* v. *Sneyd* (1828), 2 Mol. 186, *per* HART, L.C., at p. 233). For form of release to trustees by infant beneficiaries on attaining twenty-one, see Encyclopædia of Forms and Precedents, Vol. XI., p. 469.

(*q*) See p. 104, *post*.

(*r*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 7.

(*a*) By the Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 3, and the Post Office Savings Bank Regulations, 1900, regs. 55 *et seq.* (Statutory Rules and Orders Revised, Vol. XI., Savings Bank, pp. 73 *et seq.*), an infant depositor in a post office savings bank, not under sixteen years of age, may in writing nominate a person to take upon his death any sum not exceeding £100 due to him at his death, and such nomination is valid to pass the sum. By the Trustee Savings Banks Regulations, 1900 (Statutory Rules and Orders Revised, Vol. XI., Savings Bank, pp. 26 *et seq.*), regs. 10 *et seq.*, made pursuant to the Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 2, a similar power of nomination is given to infant depositors in Trustee Savings Banks; and see title BANKERS

SECT. 3. Qualified Disabilities.

SECT. 3.—*Qualified Disabilities.*

SUB-SECT. 1.—*Executorship.*

Appointment and exercise of office.

138. An infant may be appointed an executor (*b*), but he cannot exercise the office until he has attained full age (*c*), and, if he intermeddles with the estate, he cannot be made to account as an executor *de son tort* (*d*). In the event of the sole executor or all the executors being under age, administration will be granted to the guardian or such other person as the court thinks fit until the sole executor or the first of the co-executors attains full age (*e*). The administration will then terminate (*f*), and the executor attaining full age will be entitled to take out probate (*g*).

Administration *durante minore ætate.*

Infant co-executor with adults.

If adult executors are appointed jointly with an infant, they can execute the will (*h*), but the right to take out probate upon attaining full age will be reserved to the infant (*i*). He will not, however, be liable for the acts of his co-executors until he does so (*k*).

Vesting of testator's real estate.

Upon the death of a person dying after the 31st December, 1897, his real estate becomes vested in his personal representatives (*l*),

AND BANKING, Vol. I., pp. 578, 580. By the Post Office Annuity and Insurance Regulations, 1888 and 1895, reg. 41 (Statutory Rules and Orders Revised, Vol. XI., Savings Bank, p. 52), made pursuant to the Government Annuities Act, 1882 (45 & 46 Vict. c. 51), s. 6, a similar power of nomination is given in respect of savings bank insurances. As to the similar power of nomination given to members of friendly societies, industrial and provident societies, and trade unions, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 192; FRIENDLY SOCIETIES, Vol. XV., pp. 152, 153; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, pp. 17, 18, *ante;* TRADE AND TRADE UNIONS.

(*b*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 139; 2 Bl. Com. 503; Swinburne on Wills, p. 196; Went. Off. Ex., 14th ed., p. 390. A child *en ventre sa mère* may be appointed (2 Bl. Com. 503; Godolphin, Orphan's Legacy, 3rd ed., p. 102), and if, in that case, more than one child is born, all will be admitted executors (Godolphin, Orphan's Legacy, 3rd ed., p. 102).

(*c*) Administration of Estates Act, 1798 (38 Geo. 3, c. 87), s. 6, prior to which he could exercise the office at the age of seventeen (Went. Off. Ex., 14th ed., p. 390); though the Court of Chancery would not pay out money to an infant executor (*Campart* v. *Campart* (1790), 3 Bro. C. C. 195).

(*d*) *Stott* v. *Meanock* (1862), 31 L. J. (CH.) 746. As to the incidents of a legacy given to an infant executor, see p. 76, *post*, and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 273.

(*e*) *Bennet* v. *Baud* (1664), 1 Sid. 185; Shep. Touch., pp. 490, 491; Burn, Ecclesiastical Law, Vol. IV., pp. 385 *et seq.;* Administration of Estates Act, 1798 (38 Geo. 3, c. 87), ss. 6, 7; Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73; *In the Goods of Stewart* (1875), L. R. 3 P. & D. 244; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 197. As to the distinction made between infants and minors in the appointment of a guardian for the purpose of taking out administration *durante minore ætate*, see p. 44, *ante*.

(*f*) Shep. Touch., p. 491; Godolphin, Orphan's Legacy, 3rd ed., pp. 231, 232; Burn, Ecclesiastical Law, Vol. IV., pp. 384 *et seq.;* Bac. Abr., tit. Executors and Administrators (B.) 1 (3); *Taylor* v. *Watts* (1676), Freem. (K. B.) 425.

(*g*) Administration of Estates Act, 1798 (38 Geo. 3, c. 87), s. 6.

(*h*) *Pigot and Gascoin's Case* (1616), 1 Brownl. 46; *Foxwist* v. *Tremain* (1670), 1 Mod. Rep. 47; *Colborne* v. *Wright* (1679), 2 Lev. 239; Bac. Abr., tit. Executors and Administrators (B.) 1; Com. Dig., tit. Administration (B. 12).

(*i*) Burn, Ecclesiastical Law, Vol. IV., p. 310; *Cummins* v. *Cummins* (1845), 3 Jo. & Lat. 64.

(*k*) *Russel's Case* (1584), 5 Co. Rep. 27 a; *Whitmore* v. *Weld* (1685), 1 Vern. 326, 328; *Cummins* v. *Cummins*, *supra*, at p. 96.

(*l*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (1); see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 238.

including executors who have not proved the will unless they have renounced probate (*m*). The law contemplates a subsequent assent by the personal representatives to a devise contained in the will or the conveyance of land by them to a person entitled thereto as heir, devisee, or otherwise (*n*), and provides that some or one only of several joint personal representatives shall not sell or transfer real estate without the authority of the court (*o*); but no provision is made for the case of an infant being appointed an executor.

Administration *durante minore ætate* where infant is next of kin.

Where an infant is next of kin or is otherwise interested in the property of a person who dies intestate or without having appointed an executor who acts, administration will not be granted to him until he comes of full age and applies for a grant of administration to himself (*p*). The court will in general recognise the right of a minor, that is to say, an infant over seven years of age, to elect the person to be appointed, provided he is suitable (*q*). But it has unfettered discretion over the appointment (*r*), and can, if it thinks fit, overrule such election (*a*).

SUB-SECT. 2.—*Trusteeship.*

Infant trustee.

139. An infant can be a trustee (*b*); but he remains, as such, under the disabilities incident to infancy, and therefore (1) cannot execute a trust involving the exercise of discretion (*c*); (2) is not liable for breaches of trust which he commits during his minority (*d*),

(*m*) *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58, 64

(*n*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3 (1).

(*o*) *Ibid.*, s. 2 (2).

(*p*) Com. Dig., tit. Administration (F.); *Grandison* (*Lord*) v. *Dover* (*Countess*) (1684), Skin. 155; *In the Goods of Lilley* (1897), 76 L. T. 164. This is done even in the case of an infant foreigner who by the law of his domicil would be entitled to the grant (*In the Goods of D'Orléans* (*Duchess*) (1859), 1 Sw. & Tr. 253, where the earlier case, *In the Goods of Da Cunha* (*Countess*) (1828), 1 Hag. Ecc. 237, in which, however, the circumstances were special, was not followed). Where administration was granted to an infant, and he acted under it, an account of his receipts during infancy could not be directed against him (*Hindmarsh* v. *Southgate* (1827), 3 Russ. 324). For form of release of an administrator *durante minore ætate* by the infant on attaining twenty-one, see Encyclopædia of Forms and Precedents, Vol. XI., p. 479.

(*q*) *R.* v. *Bettesworth* (1730), Fitz-G. 163, *per* LEE, J., at p. 164; *In the Goods of Weir* (*Mary*) (1862), 2 Sw. & Tr. 451; *In the Goods of Burchmore* (1874), L. R. 3 P. & D. 139; *In the Goods of Gardiner* (1884), 9 P. D. 66; *In the Goods of Webb* (1888), 13 P. D. 71. An infant wife may elect her husband as administrator during her minority (Toller, Law of Executors and Administrators, p. 92).

(*r*) *West and Smith* v. *Willby* (1820), 3 Phillim. 374; *In the Goods of Ewing* (1828), 1 Hag. Ecc. 381; Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73.

(*a*) *Fawkener and Freemantle* v. *Jordan* (1756), 2 Lee, 327, *per* Sir GEORGE LEE, at p. 330; and see, generally, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 197, 198.

(*b*) *Jevon* v. *Bush* (1685), 1 Vern. 342, *per* Lord JEFFREYS, L.C., at p. 343; *King* v. *Denison* (1813), 1 Ves. & B. 260, *per* Lord ELDON, L.C., at p. 275; *King* v. *Bellord* (1863), 1 Hem. & M. 343; and see title TRUSTS AND TRUSTEES.

(*c*) *King* v. *Bellord*, *supra*. As to powers, see pp. 53, 54, *post*.

(*d*) *Russel's Case* (1584), 5 Co. Rep. 27 a; *Whitmore* v. *Weld* (1685), 1 Vern. 326, 328; *Hindmarsh* v. *Southgate* (1827), 3 Russ. 324; *Stott* v. *Meanock* (1862), 31 L. J. (CH.) 746; but it is otherwise if the breach continues after the infant trustee has attained full age (*Sculthorpe* v. *Tipper* (1871), L. R. 13 Eq. 232).

SECT. 3. Qualified Disabilities.

except in case of fraud (*e*); and (3) is limited as to his power of conveying or disposing of trust property vested in him (*f*).

Presumption against trusteeship.

Owing to these inconveniences in an infant being trustee, the court will, in a case of doubt, lean to the view that property given to him devolves on him beneficially and not as trustee (*g*).

Removal of infant trustee.

An infant trustee is not a trustee unfit or incapable to act, in whose place a new trustee can be appointed under the statutory power of appointing new trustees (*h*); but the court (*i*) can and will appoint a new trustee in the place of an infant trustee where such a course is expedient (*k*).

Vesting order as to land, stock, or chose in action.

Where a trustee entitled to any land or to a contingent right therein, or to stock, or to a chose in action, either solely or jointly with any other person, is an infant, the court may make an order vesting in any person either the land (for any estate therein) or the right to transfer or call for a transfer of the stock, or to receive the income thereof, or to sue for or recover the chose in action, or releasing or disposing of the contingent right (*l*).

SUB-SECT. 3.—*Protectorship of Settlement.*

Infant protector of settlement.

140. Where under the Fines and Recoveries Act, 1833 (*m*), the protector of a settlement, not being the owner of a prior estate under the settlement, is an infant, the Chancery Division of the High Court is protector of the settlement in his place and may act accordingly (*n*).

(*e*) *Re Garnes, Garnes* v. *Applin* (1885), 31 Ch. D. 147, C. A., *per* FRY, L.J., at p. 151; and see p. 74, *post*.

(*f*) *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794, 1803, 1804; —— v. *Handcock* (1810), 17 Ves. 383.

(*g*) *Mumma* v. *Mumma* (1687), 2 Vern. 19; *King* v. *Denison* (1813), 1 Ves. & B. 260, *per* Lord ELDON, L.C., at p. 278. For form of release by beneficiary on attaining majority, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 465, 469.

(*h*) *Re Tallatire*, [1885] W. N. 191; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10.

(*i*) The High Court of Justice (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25), or, in cases within their respective jurisdictions, a palatine court or a county court (*ibid.*, s. 46); *Re Gartside's Estate* (1853), 1 W. R. 196; *Re Porter's Trusts* (1856), 4 W. R. 417.

(*k*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25; *Re Gartside's Estate, supra; Re Porter's Trusts, supra; Re Shelmerdine and The Trustee Act*, 1850 (1864), 33 L. J. (CH.) 474; *Re Brunt*, [1883] W. N. 220; *Re Tallatire, supra*. But the appointment should be without prejudice to any application by the infant, on attaining full age, to be restored to the trusteeship (*Re Shelmerdine and The Trustee Act*, 1850, *supra*).

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26 (ii.), 35 (1); see title TRUSTS AND TRUSTEES. The order may be made, notwithstanding that the infant is beneficially interested in the property (*Re Harwood* (*Infants*) (1882), 20 Ch. D. 536; *Re Findlay* (*an Infant*) (1886), 32 Ch. D. 221, 641; *Re Kemp* (*Alice*), [1888] W. N. 138; *Re Barnett's Estate, Foster* v. *Barnett*, [1889] W. N. 216; *Re Dehaynin* (*Infants*), [1910] 1 Ch. 223, C. A.).

(*m*) 3 & 4 Will. 4, c. 74

(*n*) *Ibid.*, ss. 33, 48; but no provision is made for the case of the infancy of a protector who is the owner of a prior estate under the settlement. See also title SETTLEMENTS.

SUB-SECT. 4.—*Partnership.*

SECT. 3. Qualified Disabilities.

Status of infant partner.

141. An infant may be a partner in trade or business (*o*), but he incurs no liability for the debts of the firm or for the acts of his co-partners (*p*). The partnership assets are, however, applicable in payment of the liabilities of the partnership, and until these are provided for, the infant partner is not entitled to receive any part of them (*q*). In an action against the partners, the infant partner ought not to be joined as a defendant (*r*); and if the action is brought against them in the name of the firm and judgment is given against them, it should be entered against the firm exclusive of the infant partner (*s*).

Right on attaining full age.

142. Upon attaining full age the infant partner may repudiate and dissolve the partnership, but if he neglects to do so within a reasonable time he will incur full liability as a partner (*t*). If he disaffirms the partnership he cannot recover back money which he has paid as a premium on entering it (*a*); nor can he claim as against his co-partners to share the profits without also sharing the losses of the concern (*b*).

Dissolution of partnership.

143. If the winding-up or dissolution of a partnership is right upon other grounds, the infancy of one partner will not prevent a sale of the partnership concern and assets (*c*); and the sale of the whole to one or more of the other partners will be sanctioned if it appears to be for the infant's benefit (*d*).

SUB-SECT. 5.—*Exercise of Powers.*

Character of power.

144. The capacity of an infant to dispose of or affect property by the exercise of a power by deed or writing *inter vivos* varies according to the character and subject-matter of the power. A power may be either (1) collateral, where it relates to property in

(*o*) *Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607, *per* Lord HERSCHELL, L.C., at p. 611; and see title PARTNERSHIP.

(*p*) *Ibid.*; *Harris* v. *Beauchamp Brothers*, [1893] 2 Q. B. 534, C. A.

(*q*) *Lovell and Christmas* v. *Beauchamp*, *supra*, at p. 611.

(*r*) *Chandler* v. *Parkes* (1800), 3 Esp. 76; *Jaffray* v. *Frebain* (1803), 7 Esp. 47; *Gibbs* v. *Merrill* (1810), 3 Taunt. 307; *Burgess* v. *Merrill* (1812), 4 Taunt. 468.

(*s*) *Lovell and Christmas* v. *Beauchamp*, *supra*, at p. 613. As to bankruptcy proceedings against members of the firm, see p. 55, *post*.

(*t*) *Goode* v. *Harrison* (1821), 5 B. & Ald. 147, Ex. Ch. Where under a power in the partnership deed a son is nominated to become a partner on attaining twenty-one and signing the deed, he is not, while an infant, a proper party to an action for dissolution of the partnership (*Ehrmann* v. *Ehrmann* (1894), 72 L. T. 17).

(*a*) *Holmes* v. *Blogg* (1818), 8 Taunt. 508; *Re Burrows, Ex parte Taylor* (1856), 8 De G. M. & G. 254, C. A. But he can recover back money paid in advance by him with a view to a partnership which is never in fact actually formed (*Corpe* v. *Overton* (1833), 10 Bing. 252; *Everett* v. *Wilkins* (1874), 29 L. T. 846).

(*b*) *North Western Rail. Co.* v. *M'Michael, Birkenhead, Lancashire and Cheshire Junction Rail. Co.* v. *Pilcher* (1850), 5 Exch. 114, 123, 126; *Cork and Bandon Rail. Co.* v. *Cazenove* (1847), 10 Q. B. 935; *Ebbetts' Case* (1870), 5 Ch. App. 302.

(*c*) So decided in the case of a lunatic partner (*Rowlands* v. *Evans*, *Williams* v. *Rowlands* (1861), 30 Beav. 302).

(*d*) *Crawshay* v. *Maule* (1818), 1 Swan. 495, 530.

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which he has no interest; or (2) in gross, where it relates to property in which he has an interest but does not touch his interest in it; or (3) appendant or appurtenant, where he has an interest which may be affected by the exercise of the power (*e*).

Powers affecting real and personal estate.

As regards real estate an infant can exercise a collateral power (*f*); but not a power in gross (*g*), nor a power appendant or appurtenant (*h*). As regards personal estate he can exercise a collateral power (*i*), and also a power in gross (*k*); but he can only exercise a power appendant or appurtenant where the donor of the power has indicated an intention that he should do so during infancy (*l*); and he cannot even then exercise it so as to defeat his interest in the property (*m*).

SUB-SECT. 6.—*Bankruptcy.*

Infant incapable of being made bankrupt.

145. Where an infant has, without fraud, incurred a debt which he cannot legally contract (*n*), he cannot be made a bankrupt in respect of it (*o*), even after he has attained full age (*p*). If, however, he represents himself to be of full age under circumstances

(*e*) *Re D'Angibau, Andrews* v. *Andrews* (1880), 15 Ch. D. 228, C. A., *per* JESSEL, M.R., at pp. 232, 233; and see title POWERS.

(*f*) *Hearle* v. *Greenbank* (1749), 3 Atk. 695, *per* Lord HARDWICKE, L.C., at p. 710; *Re D'Angibau, Andrews* v. *Andrews, supra, per* JESSEL, M.R., at p. 233.

(*g*) *Hearle* v. *Greenbank, supra; Re D'Angibau, Andrews* v. *Andrews, supra, per* BRETT, L.J., at pp. 243, 244.

(*h*) *Grange* v. *Tiving* (1665), O. Bridg. 107, 115, 116; *Hearle* v. *Greenbank, supra; King* v. *Bellord* (1863), 1 Hem. & M. 343; unless expressly authorised by Act of Parliament (*Kilmurry* (*Lord*) v. *Gcery* (1713), 2 Salk. 538, cited in *Evelyn* v. *Evelyn* (1732), 2 P. Wms. 659, 671, and in *Hearle* v. *Greenbank, supra*, at p. 713).

(*i*) *Hearle* v. *Greenbank, supra; King* v. *Bellord, supra; Re D'Angibau, Andrews* v. *Andrews, supra.*

(*k*) *Re D'Angibau, Andrews* v. *Andrews, supra, dissentiente* COTTON, L.J.

(*l*) *Re Cardross's Settlement* (1878), 7 Ch. D. 728; *Re D'Angibau, Andrews* v. *Andrews, supra*, at pp. 234, 243 *et seq.* As regards the exercise by an infant trustee of discretionary powers, he can exercise a power where he is a simple conduit pipe of the will of the donor of the power, and has no discretion in the matter (*Grange* v. *Tiving, supra*, at p. 109; *Hearle* v. *Greenbank, supra, per* Lord HARDWICKE, L.C., at p. 710; *King* v. *Bellord, supra, per* PAGE WOOD, V.-C. (afterwards Lord HATHERLEY), at p. 348); and it seems that an infant can exercise a power even though it be coupled with an interest, if an intention clearly appears that it should be exercisable during minority (*Re Cardross's Settlement, supra; Re D'Angibau, Andrews* v. *Andrews, supra; Re Newcastle's* (*Duke*) *Estates* (1883), 24 Ch. D. 129, *per* PEARSON, J., at p. 136).

(*m*) *Re Armit's Trusts* (1871), 5 I. R. Eq. 352.

(*n*) See pp. 63 *et seq.*, *post.*

(*o*) *Ex parte Sydebotham* (1742), 1 Atk. 146; *Ex parte Moule* (1808), 14 Ves. 602; *Ex parte Adam* (1813), 1 Ves. & B. 493, 494; *Belton* v. *Hodges* (1832), 9 Bing. 365; *Re Lees, Ex parte Lees, Ex parte Heatherley* (1836), 1 Deac. 705; *Re Raineys* (1880), 3 L. R. Ir. 459; *Re Jones, Ex parte Jones* (1881), 18 Ch. D. 109, C. A.; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 11, 12, 28, 41, 314; and as to bankruptcy on a debt contracted for necessaries, see *ibid.*, pp. 12, 41. As to the effect of a foreign bankruptcy, see title CONFLICT OF LAWS, Vol. VI., p. 234.

(*p*) *Re Onslow, Ex parte Kibble* (1875), 10 Ch. App. 373, C. A.; *Re Jones, Ex parte Jones, supra*, at pp. 122, 126, overruling *Re Lynch, Ex parte Lynch* (1876), 2 Ch. D. 227.

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amounting to a fraud on a creditor, he may be made bankrupt in respect of the debt, after attaining full age (*q*). Except, therefore, in case of fraud, an infant cannot be convicted of an offence against the bankruptcy laws (*a*). Where an infant is a member of a firm, a receiving order cannot be made against the firm as a whole, but receiving orders may be made against the other members of the firm individually (*b*), or against the firm exclusive of the infant partner (*c*).

Order and disposition.

146. An infant cannot give his consent or permission to goods of which he is the true owner being in the possession, order, or disposition of a bankrupt within the meaning of the bankruptcy laws (*d*). Where one of two partners is an infant and the other becomes bankrupt, the goods of a third party in the possession of the firm are not in the order and disposition of the bankrupt (*e*).

Bankruptcy petition by infant.

147. An infant may present a bankruptcy petition, though the debtor may be entitled on application to have an adult added as security for costs (*f*). An infant cannot be appointed a proxy to vote at a meeting of creditors under a bankruptcy (*g*).

SECT. 4.—*Complete Capacity.*

SUB-SECT. 1.—*Tenure of certain Offices and Positions.*

Sovereign.

148. An infant can be King or Queen, and in law there is no such thing as incapacity from infancy in the case of the Sovereign (*h*). But in the case of a Sovereign under the age of eighteen a regent is in practice always appointed (*i*).

(*q*) *Ex parte Watson* (1809), 16 Ves. 265; *Re Lees, Ex parte Lees, Ex parte Heatherley* (1836), 1 Deac. 705, 709; *Re Bates, Ex parte Bates* (1841), 2 Mont. D. & De G. 337; *Re King, Ex parte Unity Joint Stock Mutual Banking Association* (1858), 3 De G. & J. 63, C. A.; *Maclean* v. *Dummett* (1869), 22 L. T. 710, P. C., *per* GIFFARD, L.J., at pp. 711, 712. The mere fact of trading is not in itself such a representation (*Re Jones, Ex parte Jones* (1881), 18 Ch. D. 109, C. A., at pp. 120, 121, 123).

(*a*) *R.* v. *Wilson* (1879), 5 Q. B. D. 28, C. C. R.; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 349.

(*b*) *Ex parte Henderson* (1798), 4 Ves. 163; *Ex parte Layton, Ex parte Hardwicke* (1801), 6 Ves. 434, *per* Lord ELDON, L.C., at p. 440; *Re Lees, Ex parte Lees, Ex parte Heatherley, supra.*

(*c*) *Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607, *per* Lord HERSCHELL, L.C., at p. 613; and see p. 53, *ante.*

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.); *Re Mills' Trusts*, [1895] 2 Ch. 564, C. A.; and see title BANKRUPTCY AND INSOLVENCY, pp. 144 *et seq.*

(*e*) *Re Lake, Ex parte Dorman* (1872), 8 Ch. App. 51. As to the law of partnership generally, see title PARTNERSHIP.

(*f*) *Re Brocklebank, Ex parte Brocklebank* (1877), 6 Ch. D. 358, C. A. As to proof under a bankruptcy of a debt owing to an infant, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 232.

(*g*) Bankruptcy Rules, 248 (Statutory Rules and Orders Revised, Vol. I., Bankruptcy, England, p. 53).

(*h*) *Lancaster (Duchy) Case* (1561), Plowd. 212, 213; Co. Litt. 43 a, b; 1 Roll. Abr. 728, tit. Enfants, A.; 1 Bl. Com. 248; and see title CONSTITUTIONAL LAW, Vol. VI., pp. 375, 376.

(*i*) 1 Bl. Com. 248; and see also stat. (1755) 5 Geo. 3, c. 27; stat. (1830) 1 Will. 4, c. 2; stat. (1840) 3 & 4 Vict. c. 52; Regency Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 26).

SECT. 4. Complete Capacity.

An infant can be a peer, and if a peerage is conferred upon him during infancy he cannot waive or refuse the dignity (*k*).

Peer.

149. An infant may be a sheriff (*l*) or a gaoler (*m*), and may hold any other office for which he can appoint a deputy (*n*), or which is merely ministerial and does not involve discretion (*o*).

Officer who can appoint a deputy.

Lord of a manor.

150. An infant can be lord of a manor and make grants and perform the other functions of the office, because his actions are only instrumental, and for the advantage of the copyholder (*p*). An infant may also be steward of a manor (*q*), and may even act as deputy steward (*r*).

Where the office of parker or steward or any similar office is held in fee, it may descend to an infant (*s*).

Master to apprentice.

151. An infant may become master to an apprentice (*a*).

SUB-SECT. 2.—*Public and other Duties.*

Homage and allegiance.

152. An infant can do homage (*b*), and, after the age of twelve years, can take the oath of allegiance (*c*).

Capacity to give evidence.

153. An infant who has sufficient understanding to know the nature and obligation of an oath can give evidence in legal proceedings (*d*).

(*k*) *Queensberry and Dover's (Duke) Case* (1719), 1 P. Wms. 582, 592, H. L.; *Mortimer Sackville's Case* (1719), cited in *Buckhurst Peerage* (1876), 2 App. Cas. 1, H. L., at p. 6, n. (1). See also title PEERAGES AND DIGNITIES.

(*l*) *Young* v. *Fowler* (1639), Cro. Car. 555, 556; *Claridge* v. *Evelyn* (1821), 5 B. & Ald. 81, *per* ABBOTT, C.J., at p. 86; and as to sheriffs generally, see title SHERIFFS AND BAILIFFS.

(*m*) 2 Co. Inst. 382; Com. Dig., tit. Officer (B. 3); *Whittingham's Case* (1603), 8 Co. Rep. 42 b, 44 b; *Young* v. *Fowler*, *supra*, at p. 556; *Claridge* v. *Evelyn*, *supra*, at p. 86.

(*n*) *Young* v. *Stoell* (1632), Cro. Car. 279; *Young* v. *Fowler*, *supra*; *Claridge* v. *Evelyn*, *supra*, at p. 86.

(*o*) Bac. Abr., tit. Infancy and Age (E.), 7th ed., p. 345; Com. Dig., tit. Officer (B. 3); *Crosbie* v. *Hurley* (1833), Alc. & N. 431, 440. As to public officers generally, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*p*) *Swayne's Case* (1608), 8 Co. Rep. 63 a, 63 b; Watkins on Copyholds, Vol. I., p. 24; see title COPYHOLDS, Vol. VIII., pp. 83, 116. But his guardian in socage can also hold courts and make grants (*Shopland* v. *Ryoler* (1605), Cro. Jac. 55, 99; 2 Roll. Abr. 41; Watkins on Copyholds, 7th ed., Vol. I., p. 25).

(*q*) Coke, Complete Copy-Holder (1673), ss. 45, 46; Com. Dig., tit. Copyhold (R. 5), tit. Officer (B. 3); see title COPYHOLDS, Vol. VIII., p. 62.

(*r*) *Eddleston* v. *Collins* (1852), 10 Hare, 99, *per* TURNER, V.-C., at pp. 105 *et seq.*; S. C., on appeal (1853), 3 De G. M. & G. 1, C. A., *per* TURNER, L.J., at p. 14. As to the capacity of an infant to be a copyholder, see p. 96, *post*.

(*s*) Coke, Complete Copy-Holder (1673), ss. 45, 46; *Whittingham's Case*, *supra*; *Claridge* v. *Evelyn*, *supra*.

(*a*) *R.* v. *St. Petrox in Dartmouth* (*Inhabitants*) (1791), 4 Term Rep. 196. As to apprentices, see pp. 69 *et seq.*, *post*; and title MASTER AND SERVANT.

(*b*) Co. Litt. 65 b; Com. Dig., tit. Enfant (B. 6).

(*c*) Co. Litt. 68 b, 78 b, 172 b; 1 Bl. Com. 463; Bac. Abr., tit. Infancy and Age (A.), 7th ed., p. 338.

(*d*) 1 Hale, P. C. 302, 634; 2 Hale, P. C. 278, 279; 1 East, P. C. 441 *et seq.*; 4 Bl. Com. 214; *Young* v. *Slaughterford* (1709), 11 Mod. Rep. 228; *Omychund* v. *Barker* (1744), 1 Atk. 21, 29 *R.* v. *Brasier* (1779), 1 Leach, 199, C. C. R.; *R.* v. *Williams* (1835), 7 C. & P. 320. See generally, title EVIDENCE, Vol. XIII.,

154. An infant can voluntarily do that which he ought to do and which in law he is bound to do (*e*). Performance of duty.

155. Where an infant, however young he may be, is the owner of an advowson or has a right of presentation or nomination to a benefice, he is capable of presenting or nominating to the benefice on an avoidance thereof (*f*). Presentation to benefice.

SUB-SECT. 3.—*Marriage.*

156. A binding marriage can be contracted by an infant of the male sex at the age of fourteen years, and by an infant of the female sex at the age of twelve years (*g*). A marriage by an infant of more tender years is not void, but is voidable by the infant upon attaining the age for contracting a binding marriage (*h*). Marriage of infant.

157. A promise of marriage made by an infant is not binding upon him (*i*), but an infant can bring an action for breach of such a Promise of marriage by infant.

p. 569. As to the evidence of a child in certain cases of offences against children, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 408.

(*e*) *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794, *per* Lord MANSFIELD, L.J., at pp. 1801, 1802.

(*f*) See title ECCLESIASTICAL LAW, Vol. XI., p. 573; and p. 101, *post.*

(*g*) Co. Litt. 79 a, b; 1 Bl. Com. 463; Bac. Abr., tit. Infancy and Age (A.), 7th ed., pp. 336 *et seq.*; *Harvey* v. *Ashley* (1748), 3 Atk. 607, 610. See also title HUSBAND AND WIFE, Vol. XVI., pp. 281 *et seq.* As to cases where consent is required, see titles ECCLESIASTICAL LAW, Vol. XI., p. 693; HUSBAND AND WIFE, Vol. XVI., p. 296. The person whose consent to the marriage of an infant, not being a widower or widow, is required, is the father, or if he is dead, the guardian appointed by the father (*Horner* v. *Horner* (1799), 1 Hag. Con. 337, 355; *Ex parte Reibey* (1843), 12 L. J. (CH.) 436), with whom the mother, if living, unless declared to be unfit or removed from the office by the court, or (if she be dead) any guardian appointed by her, is associated (Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 2—4, 6, 7), and if there be no guardian appointed by the father, then the mother, if she is alive and unmarried, although she has been removed from the office of guardian, and if there be not a mother unmarried, then the guardian appointed by the mother, or, if none, the guardian appointed by the Chancery Division of the High Court of Justice, if any (Marriage Act, 1823 (4 Geo. 4, c. 76), s. 16). As to the cases where the court may give an effectual consent to the marriage, see title HUSBAND AND WIFE, Vol. XVI., pp. 296, 297; *Blake* v. *Blake* (1772), 2 Dick. 459; *Ex parte I. C.* (1838), 3 My. & Cr. 471; *Ex parte Reibey, supra*). As to the case of an illegitimate infant, see title HUSBAND AND WIFE, Vol. XVI., p. 296; *Droney* v. *Archer* (1815), 2 Phillim. 327. The consent will be presumed until the contrary is proved (*Harrison* v. *Southampton Corporation* (1853), 22 L. J. (CH.) 722, C. A.). It must not be capriciously withdrawn (*Re Brown, Ingall* v. *Brown*, [1904] 1 Ch. 120). For form of consent, see Encyclopædia of Forms and Precedents, Vol. VI., p. 554. See also titles ECCLESIASTICAL LAW, Vol. XI., pp. 693, 700, 702; HUSBAND AND WIFE, Vol. XVI., pp. 294, 296. As to the consequences and effect of a marriage without the prescribed consent and procured by false swearing, see Marriage Act, 1823 (4 Geo. 4, c. 76), ss. 23, 24; *A.-G.* v. *Mullay* (1828), 4 Russ. 329; *A.-G.* v. *Severne* (1844), 1 Coll. 313; *A.-G.* v. *Mullay* (1844), 7 Beav. 351; *A.-G.* v. *Lucas* (1848), 2 Ph. 753; *A.-G.* v. *Clements* (1871), L. R. 12 Eq. 32; *A.-G.* v. *Read* (1871), L. R. 12 Eq. 38; *A.-G.* v. *Wareing* (1880), 28 W. R. 623; *A.-G.* v. *Teather* (1881), 29 W. R. 347; and title HUSBAND AND WIFE, Vol. XVI., pp. 297, 298. As to marriages of wards of court, see pp. 148, 149, *post;* and as to marriage settlements generally, see pp. 101 *et seq.*, *post;* and title SETTLEMENTS.

(*h*) Bac. Abr., tit. Infancy and Age (A.), 7th ed., pp. 336 *et seq.*; and see title HUSBAND AND WIFE, Vol. XVI., pp. 273 *et seq.*

(*i*) *Holt* v. *Ward Clarencieux* (1732), 2 Stra. 937.

SECT. 4. Complete Capacity.

promise by an adult (*k*). Where a party is sued, after attaining full age, for a breach of promise of marriage originally made during his infancy, his liability depends on whether what has taken place since he attained full age amounts to a fresh promise, or is only a ratification of the previous promise (*l*).

SUB-SECT. 4.—*Appointment of Guardian for Himself or his Children.*

Election of guardian by infant.

158. An infant possessed of socage land by descent (*m*), whose father and mother are dead, and for whom there is no testamentary guardian, has, after attaining the age of fourteen or, in the case of a female, twelve (*n*), the power of appointing a guardian for himself or herself (*o*). The court, in recognition of this principle, will give weight to the inclination of the infant in appointing a guardian, where the circumstance of heirship in socage does not exist (*p*), or where it is asked to override or supersede the infant's own power of appointment (*a*).

The appointment is usually, but apparently need not necessarily be, made by deed (*b*).

Powers of elected guardians.

The powers of a guardian appointed by the infant himself have never been strictly determined (*c*), but he can grant a lease to last during the minority of the infant, and a lease for a longer term, which, however, is voidable by the infant on attaining full age (*d*), and he can bring an action of ejectment in respect of the infant's land (*e*). But he has no power to consent to the infant's marriage under a provision in a will or settlement with respect to marriage during minority with the guardian's consent (*f*).

(*k*) *Holt* v. *Ward Clarencieux* (1732), 2 Stra. 937.

(*l*) Infants Relief Act, 1874 (37 & 38 Vict. c. 72), s. 2; *Coxhead* v. *Mullis* (1878), 3 C. P. D. 439; *Northcote* v. *Doughty* (1879), 4 C. P. D. 385; *Ditcham* v. *Worrall* (1880), 5 C. P. D. 410; *Holmes* v. *Brierley* (1888), 36 W. R. 795, C. A.; and see title HUSBAND AND WIFE, Vol. XVI., p. 273.

(*m*) Co. Litt. 87 b; Com. Dig. tit. Gardian (F. 1); Bac. Abr., tit. Guardian (A.), 7th ed., p. 93; *Quadring* v. *Downs* (1677), 2 Mod. Rep. 176. See also title DESCENT AND DISTRIBUTION, Vol. XI., pp. 3, 7 *et seq.* As to socage tenure, see p. 121, *post*, and title REAL PROPERTY AND CHATTELS REAL.

(*n*) Bac. Abr., tit. Guardian (A.), 7th ed., p. 93; *Anon.* (1751), 2 Ves. Sen. 374, *per* Lord HARDWICKE, L.C., at p. 375. When guardianship in socage terminated at the infant's attaining the age of fourteen (Co. Litt. 87 b; Bac. Abr. tit. Guardian (A.), 7th ed., p. 93), an infant heir in socage under that age, unless of too tender years, could choose his guardian (Co. Litt. 87 b, 88 b, Hargrave's note (16); Com. Dig., tit. Gardian (F. 1.); Bac. Abr. tit. Guardian (A.), 7th ed., p. 93).

(*o*) Bac. Abr., tit. Guardian (A.), 7th ed., p. 93; *Anon.*, *supra*; *Re Brown's Will*, *Re Brown's Settlement* (1881), 18 Ch. D. 61, 72, 76, C. A. For form of appointment, see Encyclopædia of Forms and Precedents, Vol. VI., p. 565.

(*p*) *Anon.*, *supra*.

(*a*) *Ex parte Edwards* (1747), 3 Atk. 519.

(*b*) Co. Litt. 88 b, Hargrave's note (16); Encyclopædia of Forms and Precedents, Vol. VI., p. 565. It was formerly frequently made by parol before a judge on circuit (Co. Litt. 88 b, Hargrave's note (16); *Anon.*, *supra*).

(*c*) *Re Brown's Will*, *Re Brown's Settlement*, *supra*, *per* JAMES, L.J., at p. 72. For the powers of guardians generally, see pp. 128 *et seq.*, *post*.

(*d*) Bac. Abr., tit. Leases and Terms for Years (I.) 9, 7th ed., pp. 783, 784.

(*e*) *Brown* v. *Weatherhead* (1844), 4 Hare, 122, where, however, an action of ejectment brought by the guardian was stayed as prejudicial to the infant's interests.

(*f*) *Re Brown's Will*, *Re Brown's Settlement*, *supra*, at p. 76.

The appointment of a guardian by the infant does not preclude the power of the court to appoint a guardian for him (*g*), and a guardian appointed by the court will supersede the guardian appointed by the infant (*h*).

Subsequent appointment by the court.

159. An infant father (*i*) or mother (*k*) has the same power of appointing by deed guardians of his or her children as is possessed by an adult father or mother (*l*).

Appointment by infant of guardian to his children.

SUB-SECT. 5.—*Agency.*

160. An infant can act as agent and may be the donee of a power of attorney, and bind his principal to the same extent as an agent or attorney of full age (*m*); but he is not liable to account to his principal, nor is he liable to third parties for his dealings with them, in circumstances where an adult agent would have been personally liable to them (*n*), except in case of fraud or tort (*o*).

Infant agent.

SUB-SECT. 6.—*Membership of Corporations, Companies, and Societies.*

161. The capacity of an infant to be a member of a corporation depends on whether the charter or statute, under which the corporation is constituted, expressly, or by implication, permits infants to be members of it. Where the charter or statute contains no express provision, one way or the other, on the subject, the capacity of an infant to be a member depends on whether the charter or statute contemplates the exercise by the members of functions which can or cannot be discharged by persons of tender age (*p*).

Membership of a corporation.

162. An infant may, subject to certain conditions, be a member of a building society (*q*), a friendly society (*r*), an industrial and provident society (*s*), or a trade union (*t*).

Membership of certain societies.

(*g*) *Ex parte Watkins* (1752), 2 Ves. Sen. 470; *Curtis* v. *Rippon* (1819), 4 Madd. 462; *Coham* v. *Coham* (1843), 13 Sim. 639. But the court will regard the wishes of the infant if of years of discretion (*Mansell's* (*Lord*) *Case* (*circa* 1736), cited in *Re Bedford Charity* (*Masters etc.*), *Villareal* v. *Mellish* (1737), 2 Swan. 533, at p. 536).

(*h*) *Curtis* v. *Rippon*, *supra*; *Coham* v. *Coham*, *supra*.

(*i*) Stat. (1660) 12 Car. 2, c. 24, s. 8, in which the power is expressly conferred on an infant as well as on an adult father. The power thereby given to an infant father to make the appointment by will was abolished by the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 7.

(*k*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 3, which confers the power upon a mother generally without excluding an infant mother.

(*l*) See pp. 123 *et seq.*, *post*.

(*m*) Co. Litt. 52 a; Bac. Abr., tit. Authority (B.), 7th ed., p. 433; *Smally* v. *Smally* (1700), 1 Eq. Cas. Abr. 6; *Watkins* v. *Vince* (1818), 2 Stark. 368; *Re D'Angibau*, *Andrews* v. *Andrews* (1880), 15 Ch. D. 228, C. A., *per* JAMES, L.J., at p. 246; see title AGENCY, Vol. I., p. 151. As to an infant being a bailee, see p. 75, *post*. As to the general incapacity of an infant to appoint an agent, see p. 48, *ante*.

(*n*) *Smally* v. *Smally*, *supra*; see title AGENCY, Vol. I., pp. 151, 186 *et seq.*, 219 *et seq.*

(*o*) See pp. 74, 75, *post*.

(*p*) Grant, Law of Corporations, p. 6; *R.* v. *Carter* (1774), 1 Cowp. 220; *Re Royal Naval School*, *Seymour* v. *Royal Naval School*, [1910] 1 Ch. 806.

(*q*) See title BUILDING SOCIETIES, Vol. III., pp. 337, 350, 363, 392.

(*r*) See title FRIENDLY SOCIETIES, Vol. XV., pp. 119 *et seq.*

(*s*) See title INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, p. 15, *ante*.

(*t*) See title TRADE AND TRADE UNIONS.

SECT. 4. Complete Capacity.

Membership under Companies Clauses Consolidation Act, 1845.

163. An infant may be a member of a company to which the Companies Clauses Consolidation Act, 1845 (*a*) applies (*b*), and may vote by his guardian, or by any one of them, if more than one, either in person or by proxy (*c*).

Membership under Companies (Consolidation) Act, 1908.

164. An infant may be a member of a company under the Companies (Consolidation) Act, 1908 (*d*), and may be one of the signatories to the memorandum of association (*e*). He may be a contributory (*f*) and may present a petition for winding up the company (*g*).

Repudiation of membership.

165. An infant member of a joint stock company can repudiate his membership and his holding in the company, either during infancy or upon attaining full age (*h*). If, however, he does not repudiate within a reasonable time after attaining full age, he will thenceforth be subject to all the liabilities of membership (*i*).

Liability of transferor of shares to an infant.

Where shares are transferred into the name of an infant, the transferor remains liable for calls in respect of the shares (*k*), whether at the time of the transfer he was aware of the infancy of the transferee or not (*l*). But, if he was ignorant of it, he may claim to have his liability transferred to the person who effected the transaction (*m*). If, however, a company or the liquidator of a

(*a*) 8 & 9 Vict. c. 16.

(*b*) *Cork and Bandon Rail. Co.* v. *Cazenove* (1847), 10 Q. B. 935, *per* Lord DENMAN, C.J., at p. 939. See title COMPANIES, Vol. V., p. 693.

(*c*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 79.

(*d*) 8 Edw. 7, c. 69; *Re Nassau Phosphate Co.* (1876), 2 Ch. D. 610; *Re Laxon & Co.* (2), [1892] 3 Ch. 555; see title COMPANIES, Vol. V., pp. 190, 192.

(*e*) *Re Nassau Phosphate Co., supra; Re Laxon & Co.* (2), *supra; Dennison* v. *Jeffs*, [1896] 1 Ch. 611, 617. On attaining full age he may repudiate the contract which arises on his signature (*Re Hertfordshire Brewery Co.* (1874), 22 W. R. 359; *Re Laxon & Co.* (2), *supra, per* VAUGHAN WILLIAMS, J., at pp. 561, 562); but such repudiation does not invalidate the incorporation of the company (*Re Hertfordshire Brewery Co., supra*).

(*f*) *Dennison* v. *Jeffs, supra, per* NORTH, J., at p. 617..

(*g*) *Ibid.*

(*h*) *Newry and Enniskillen Rail. Co.* v. *Coombe* (1849), 3 Exch. 565; *North Western Rail. Co.* v. *M'Michael, Birkenhead, Lancashire and Cheshire Junction Rail. Co.* v. *Pilcher* (1850), 5 Exch. 114; *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589; and see title GIFTS, Vol. XV., p. 405, and pp. 76, 77, *post*.

(*i*) *Cork and Bandon Rail. Co.* v. *Cazenove, supra; Leeds and Thirsk Rail. Co.* v. *Fearnley* (1849), 4 Exch. 26; *North Western Rail. Co.* v. *M'Michael, Birkenhead, Lancashire and Cheshire Junction Rail. Co.* v. *Pilcher, supra; Dublin and Wicklow Rail. Co.* v. *Black* (1852), 8 Exch. 181; *Lumsden's Case* (1868), 4 Ch. App. 31; *Mitchell's Case* (1870), L. R. 9 Eq. 363; *Ebbetts' Case* (1870), 5 Ch. App. 302.

(*k*) *Re St. George's Steam Packet Co., Litchfield's Case* (1850), 3 De G. & Sm. 141; *Re Electric Telegraph Co. of Ireland, Reid's Case* (1857), 24 Beav. 318; *Curtis's Case* (1868), L. R. 6 Eq. 455; *Castello's Case* (1869), L. R. 8 Eq. 504; *Re Imperial Mercantile Credit Association, Edwards' (Miss) Case*, [1869] W. N. 211; *Weston's Case* (1870), 5 Ch. App. 614; *Re Crenver and Wheal Abraham United Mining Co., Ex parte Wilson* (1872), 8 Ch. App. 45. As to transfer of shares by an infant, see pp. 61, 78, 79, *post;* and see title COMPANIES, Vol. V., p. 190.

(*l*) *Re Joint Stock Discount Co., Mann's Case* (1867), 3 Ch. App. 459, n. (1); *Capper's Case* (1868), 3 Ch. App. 458; and see title COMPANIES, Vol. V., p. 190.

(*m*) *Nickalls* v. *Furneaux*, [1869] W. N. 118; *Brown* v. *Black* (1873), 8 Ch.

company, after knowledge of the infancy of a transferee, is guilty of *laches* in making a claim against the transferor, he is relieved from his liability (*n*). He is also relieved by a subsequent transfer by the infant to an adult (*o*).

Effect of liquidation.

If a company is wound up during the infancy of a shareholder, the transfer of the shares to him may be treated as a nullity, either by the infant himself (*p*), or by the liquidator (*q*). The mere placing of the infant's name on the list of contributories does not of itself require him to make an immediate claim to be removed therefrom (*r*).

Shareholder under Gasworks Clauses Act, 1871.

Where an infant is a shareholder in a gas undertaking to which the Gasworks Clauses Act, 1871 (*s*), applies, the receipt of his guardian for any money payable to him in respect of his shares is a sufficient discharge therefor (*t*).

Bank account.

166. The position of an infant as customer of a bank has been dealt with elsewhere (*u*).

Depositor in savings banks.

167. An infant may be a depositor in a post office savings bank (*x*), or a trustee savings bank (*y*), and may purchase an annuity or effect an insurance, in a post office savings bank (*z*).

SUB-SECT. 7.—*Contracts and Property.*

Binding contracts.

168. An infant may enter into a binding contract for necessaries (*a*), or of apprenticeship (*b*) or service (*c*), since such contracts are deemed to be evidently for his benefit (*d*).

App. 939 ; *Richardson's Case* (1875), L. R. 19 Eq. 588 ; *Watson* v. *Miller*, [1876] W. N. 18. Where a jobber on the Stock Exchange buys shares and gives to the vendor the name of an infant as the purchaser and transferee, he is liable to stand in the place of the vendor in respect of liability for calls on the shares (*Nickalls* v. *Merry* (1875), L. R. 7 H. L. 530). As to jobbers on the Stock Exchange, see title STOCK EXCHANGE.

(*n*) *Capper's Case* (1868), 3 Ch. App. 458, *per* PAGE WOOD, L.J., at p. 461 ; *Parsons' Case* (1869), L. R. 8 Eq. 656 ; *Re National Bank of Wales, Ltd., Massey and Giffin's Case*, [1907] 1 Ch. 582.

(*o*) *Gooch's Case* (1872), 8 Ch. App. 266.

(*p*) *Baker's Case* (1871), 7 Ch. App. 115.

(*q*) *Curtis' Case* (1868), L. R. 6 Eq. 455 ; *Castello's Case* (1869), L. R. 8 Eq. 504 ; *Symons' Case* (1870), 5 Ch. App. 298.

(*r*) *Hart's Case* (1868), L. R. 6 Eq. 512.

(*s*) 34 & 35 Vict. c. 41.

(*t*) *Ibid.*, s. 7.

(*u*) See title BANKERS AND BANKING, Vol. I., pp. 587, 590, 631.

(*x*) Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 1 ; Post Office Savings Bank Regulations, 1900, regs. 5, 6, 17, 27 (Statutory Rules and Orders Revised, Vol. XI., Savings Bank, pp. 58, 61, 64) ; and see title BANKERS AND BANKING, Vol. I., p. 580 ; and note (*s*), p. 49, *ante*.

(*y*) Trustee Savings Bank Act, 1863 (26 & 27 Vict. c. 87), s. 30 ; Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 2 ; Trustee Savings Banks Regulations, 1900, reg. 4 (Statutory Rules and Orders Revised, Vol. XI., Savings Bank, p. 23) ; and see title BANKERS AND BANKING, Vol. I., p. 577 ; and note (*s*), p. 49, *ante*.

(*z*) Government Annuities Act, 1882 (45 & 46 Vict. c. 51), s. 6 (f) ; Post Office Annuity and Insurance Regulations, 1888 and 1895, reg. 42 (Statutory Rules and Orders, Revised, Vol. XI., Savings Bank, p. 53) ; and see note (*s*), p. 49, *ante*.

(*a*) See pp. 64, 67 *et seq.*, *post*.

(*b*) See pp. 69 *et seq.*, *post*.

(*c*) See pp. 72, 73, *post*.

(*d*) Bac. Abr., tit. Infancy and Age (I.), 7th ed., pp. 355 *et seq.*

SECT. 4. Complete Capacity.

169. The acquisition of property being generally beneficial, an infant can take any property subject to a power to avoid such acceptance, either during infancy, or on attaining full age (*e*).

Alienation of property.

170. The general incapacity of an infant effectually to alienate his property (*f*) is subject to certain exceptions, which are dealt with elsewhere (*g*).

SECT. 5.—*Prescription and Limitation of Actions.*

Infant privileges.

171. In consequence of the disabilities attaching to an infant, he has certain privileges as regards lapse of time, as in the case of the acquisition of rights by prescription (*h*), and the limitation of the period during which actions may be brought for the recovery of real (*i*) or personal property (*k*).

Action during infancy.

172. Where a person, who is entitled to bring an action, is an infant, he may, notwithstanding the special provisions of the Statutes of Limitations (*l*) with respect to infancy, bring the action by his next friend (*m*) at any time before attaining full age, either within, or subsequently to, the period within which he could have brought it, if he had been of full age when the cause of action accrued (*n*).

Infant not barred by acquiescence or laches.

173. An infant is not barred from asserting his right by acquiescence in the violation of it (*o*), or by the laches of himself or his trustees in asserting it (*p*), even though he was supposed to be of full age, if he does not actually represent himself to be so (*q*).

(*e*) See, further, pp. 75 *et seq.*, *post*.

(*f*) Co. Litt. 171 b.

(*g*) See pp. 78 *et seq.*, *post*.

(*h*) See Prescription Act, 1832 (2 & 3 Will. 4, c. 71); and title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 270.

(*i*) See Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27); Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57); and title LIMITATION OF ACTIONS.

(*k*) See Limitation Act, 1823 (21 Jac. 1, c. 16); and title LIMITATION OF ACTIONS.

(*l*) See title LIMITATION OF ACTIONS.

(*m*) See pp. 133 *et seq.*, *post*.

(*n*) *Cotton's Case* (1590), 1 Leon. 211, *per* WALMESLEY, J., at p. 215; *Chandler* v. *Vilett* (1670), 2 Saund. 120, 121 a, b; compare *Piggott* v. *Rush* (1836), 4 Ad. & El. 912.

(*o*) *Adye* v. *Feuilleteau* (1783), 3 Swan. 84, *per* Lord LOUGHBOROUGH, L.C., at p. 88; *Wilkinson* v. *Parry* (1828), 4 Russ. 272, 276; *Landed Estates Investment Co.* v. *Weeding* (1869), 18 W. R. 35. As to an infant not being bound by estoppel, see *Milner* v. *Harewood* (*Lord*) (1811), 18 Ves. 259, *per* Lord ELDON, L.C., at p. 274; and title ESTOPPEL, Vol. XIII., p. 370.

(*p*) Co. Litt. 380, a, b; 1 Bl. Com. 465; *Allen* v. *Sayer* (1699), 2 Verr. 368; *Young* v. *Harris* (1891), 65 L. T. 45.

(*q*) *Stikeman* v. *Dawson* (1847), 1 De G. & Sm. 90.

Part III.—Contracts.

SECT. 1.—*General Capacity and Liability.*

SECT. 1. General Capacity and Liability.

SUB-SECT. 1.—*Contracts when Void or Voidable, and when Binding.*

Distinction between void and voidable contracts.

174. Independently of statutory enactments, contracts by infants (*a*) are generally either void or voidable, but, in some exceptional cases, they are good and binding (*b*). A contract entered into by an infant which does not fall within the cases in which it is binding upon him (*c*) has been held void if it is clearly prejudicial to his interests (*d*), and voidable if, without being clearly prejudicial, it is not indisputably beneficial to his interests (*e*). In the former case the contract will be nugatory and null *ab initio* (*f*), and in the latter case it may be subsequently either adopted or repudiated (*g*).

Infants Relief Act, 1874.

175. By statute (*h*) all accounts stated with an infant are absolutely void (*i*), and also all contracts, whether by specialty or by simple contract, entered into by an infant for the repayment of money lent (*k*), or for goods supplied or to be supplied (*l*), with the

(*a*) As to the general law of contract, see title CONTRACT, Vol. VII., pp. 327 *et seq.*

(*b*) *Keane* v. *Boycott* (1795), 2 Hy. Bl. 512, *per* EYRE, C.J., at pp. 514, 515.

(*c*) *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. 225, C. A., *per* COLLINS, M.R., at p. 229; see pp. 67 *et seq.*, *post.*

(*d*) *Ayliff* v. *Archdale* (1602), Cro. Eliz. 920; *Keane* v. *Boycott*, *supra*; *Baylis* v. *Dineley* (1815), 3 M. & S. 477; *R.* v. *Lord* (1848), 12 Q. B. 757, *per* Lord DENMAN, C.J., at p. 765; *Flower* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 65, C. A. It has recently been considered that the distinction formerly made between void and voidable contracts is incorrect, and that all contracts by an infant are voidable by him, and not absolutely void except so far as they are affected by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62); Pollock, Principles of Contract, 7th ed., pp. 55 *et seq.*, citing *Bruce* v. *Warwick* (1815), 6 Taunt. 118, Ex. Ch., *per* GIBBS, C.J., at p. 120.

(*e*) Bac. Abr., tit. Infancy and Age (I.) 8, 7th ed., p. 376; *Baylis* v. *Dineley*, *supra*, *per* Lord ELLENBOROUGH, C.J., at p. 481; *Martin* v. *Gale* (1876), 4 Ch. D. 428. A submission by an infant to arbitration is voidable (*Stone* v. *Knight* (1627), Lat. 207; *Gill* v. *Russells* (1674), Freem. (K. B.) 62, 139); but, if it is accompanied by a penal bond, the bond is void (*Stone* v. *Knight*, *supra*). Other examples of voidable contracts are marriage settlements (see pp. 101 *et seq.*, *post*), contracts of partnership (see p. 53, *ante*), contracts to take shares (see pp. 60, 61, *ante*), and contracts to buy or sell land (see pp. 76, 79, *post*). As to bonds, see title BONDS, Vol. III., p. 83; as to contracts with bankers, see title BANKERS AND BANKING, Vol. I., pp. 587, 590, 631; as to bills of exchange, see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 490.

(*f*) Com. Dig., tit. Enfant (C. 2); *Keane* v. *Boycott*, *supra*; *Baylis* v. *Dineley*, *supra*.

(*g*) Bac. Abr., tit. Infancy and Age (I.) 5, 7th ed., pp. 371 *et seq.*; *Johnson* v. *Boyfield* (1791), 1 Ves. 314, 318, 324; *Keane* v. *Boycott*, *supra*. As to promises of marriage, see pp. 57, 58, *ante*. As to the infant not being liable to be sued upon a ratification of the contract, see p. 65, *post*.

(*h*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62).

(*i*) *Ibid.*, s. 1.

(*k*) As to money-lending, generally, see title MONEY AND MONEY-LENDING.

(*l*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1. The contract is void in the case of goods, whether they are supplied for the purpose of trading, or for personal use (*Re Jones, Ex parte Jones* (1881), 18 Ch. D. 109, C. A., *per*

SECT. 1. General Capacity and Liability.

exception of contracts for necessaries, and such others as an infant is authorised to enter into by any statute for the time being in force, or by the rules of common law or equity (*a*).

Contracts authorised by statute.

176. Contracts into which an infant is authorised by statute to enter include marriage settlements in certain cases (*b*) and the engagements arising in connection with membership in building societies (*c*), industrial and provident and friendly societies (*d*), and trade unions (*e*).

Contracts authorised by rules of common law and equity.

177. Contracts into which an infant is permitted to enter by the rules of common law and equity include contracts for and in consideration of marriage (*f*); contracts of agency (*g*); and agreements for the compromise of an action and of other matters arising in the course of litigation, which, however, strictly speaking, are agreements not by the infant himself, but by his guardian or next friend on his behalf (*h*).

Prejudicial contracts.

178. Even a contract which from its nature would be binding on an infant (*i*) may be incapable of being enforced against him on account of its particular terms being prejudicial to his interests (*j*). In that case the question whether the contract is void or enforceable depends upon whether the prejudicial stipulations in it do or do not outweigh the general benefit which the contract is regarded as conferring upon him (*k*).

SUB-SECT. 2.—*Effect of Voidable Contracts.*

Time for repudiation of voidable contract.

179. A voidable contract can be repudiated by the infant either during infancy or within a reasonable time after he attains full age (*l*), or by his representatives if he dies in infancy or after

JESSEL, M.R., at p. 122). Where goods have been supplied both during infancy and after the infant has attained full age, payment after full age cannot be appropriated to the goods supplied during infancy (*Keeping* v. *Broom* (1895), 11 T. L. R. 595).

(*a*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1. The Act does not extend to contracts not within any of the three classes, accounts stated, loans, and supply of goods (*Duncan* v. *Dixon* (1890), 44 Ch. D. 211; *Edwards* v. *Carter*, [1893] A. C. 360), but applies to contracts which at its passing were by law voidable.

(*b*) See pp. 103, 104, *post.*

(*c*) See title BUILDING SOCIETIES, Vol. III., pp. 337, 350, 363, 392.

(*d*) See title FRIENDLY SOCIETIES, Vol. XV., pp. 119 *et seq.*; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, p. 15, *ante.*

(*e*) See title TRADE AND TRADE UNIONS.

(*f*) See p. 57, *ante;* pp. 101 *et seq.*, *post;* and titles HUSBAND AND WIFE, Vol. XVI., pp. 273, 281; SETTLEMENTS.

(*g*) See p. 59, *ante.*

(*h*) See pp. 145, 146, *post.*

(*i*) See pp. 67 *et seq.*, *post.*

(*j*) *Ayliff* v. *Archdale* (1602), Cro. Eliz. 920; and see pp. 70, 72, 73, *post.*

(*k*) *Flower* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 65, C. A.; *Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 482, C. A., *per* Lord ESHER, M.R., at p. 489, *per* A. L. SMITH, L.J., at p. 495.

(*l*) Co. Litt. 380 b. Voidable means valid until repudiated, not invalid until confirmed (*Duncan* v. *Dixon*, *supra*, at p. 213). See *per* LINDLEY, M.R., in *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87, C. A.; and *Edwards* v. *Carter*, *supra*, *per* Lord HERSCHELL, L.C., at pp. 364, 365. For form of repudiation, see

attaining full age without having actually or impliedly adopted the contract (*m*). But, except in so far as no action upon it can be brought against him (*n*), it is binding on him if he takes no steps to repudiate it for a considerable time after he has attained full age (*o*), and particularly if his own circumstances, or those of other persons, have been affected by the belief that he had regarded the contract as binding (*p*).

SUB-SECT. 3.—*Ratification.*

Ratification.

180. No action can be brought to charge a person upon a promise made after attaining full age to pay a debt contracted during infancy, or upon a ratification made after full age of a promise or contract made during infancy, whether there is or is not any new consideration for the promise or ratification after full age (*q*). This provision applies not merely to debts, but to all contracts, including a promise of marriage (*r*).

Betting and Loans (Infants) Act, 1892.

If a person who during infancy has contracted a loan which is void at law agrees after attaining full age to pay money which in whole or in part represents or is agreed to be paid in respect of the loan, and is not a new advance, the agreement, and any negotiable or other instrument given for carrying into effect the agreement or otherwise in relation to the payment of money in respect of the loan, is, so far as it represents or is payable in respect of the loan, absolutely void (*s*).

Encyclopædia of Forms and Precedents, Vol. VI., p. 557. A repudiation during infancy is as voidable as the contract itself; see note (*n*), p. 79, *post*.

(*m*) *Douglas* v. *Watson* (1856), 17 C. B. 685, *per* JERVIS, C.J., at p. 691.

(*n*) See note (*q*), *infra*.

(*o*) *Smith* v. *Lucas* (1881), 18 Ch. D. 531, 543, 544; *Cooper* v. *Cooper* (1888), 13 App. Cas. 88; *Duncan* v. *Dixon* (1890), 44 Ch. D. 211; *Edwards* v. *Carter*, [1893] A. C. 360. But see *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87, C. A., where the infant changed her domicil.

(*p*) *Edwards* v. *Carter*, *supra*, *per* Lord SHAND, at p. 368.

(*q*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2; *Re Foulkes*, *Foulkes* v. *Hughes* (1893), 69 L. T. 183, where, however, the mortgage impugned was held to be an entirely fresh transaction. Where the ratification consists in allowing judgment in an action to go by default, the judgment cannot be made the foundation of bankruptcy proceedings (*Re Onslow*, *Ex parte Kibble* (1875), 10 Ch. App. 373), or of a charging order on funds in court (*Re Onslow's Trusts* (1875), L. R. 20 Eq. 677). A bill of exchange given in satisfaction of a debt incurred during infancy cannot be sued upon (*Belfast Banking Co.* v. *Doherty* (1879), 4 L. R. Ir. 124; *Smith* v. *King*, [1892] 2 Q. B. 543). The ratification cannot be pleaded by way of set-off (*Rawley* v. *Rawley* (1876), 1 Q. B. D. 460, C. A., *per* MELLISH, L.J., at pp. 467, 468). Where, however, an infant purchased land from a building society of which he was a member and committeeman, and paid instalments of the purchase-money and acted as committeeman for four years after attaining full age, it was held that he could not repudiate the contract (*Whittingham* v. *Murdy* (1889), 60 L. T. 956). See also *Nottingham Permanent Benefit Building Society* v. *Thurstan*, [1903] A. C. 6, where it was held that an infant cannot make a valid mortgage to carry out such a purchase. See also title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 490.

(*r*) *Coxhead* v. *Mullis* (1878), 3 C. P. D. 439; and cases cited in note (*l*), p. 58, *ante*. As to whether, after a promise of marriage made during infancy, there is merely a ratification of it or a fresh promise after attaining full age, see pp. 57, 58, *ante*. See also title HUSBAND AND WIFE, Vol. XVI., p. 249.

(*s*) Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 5. Any

SECT. 1. General Capacity and Liability.

SUB-SECT. 4.—*Fraudulent Misrepresentation as to Age.*

Misrepresentation as to age.

181. An infant cannot take advantage of a fraudulent misrepresentation made by him as to his age (*t*). A trustee, who has paid over funds to an infant on his fraudulent representation that he is of age, will not be liable to pay them again (*a*), and a specific release given to a trustee by an infant who represents himself to be of age will be binding on him (*b*).

In obtaining a loan on credit.

Where a person has, while under age, obtained a loan or incurred a debt by a fraudulent misrepresentation as to his being of age, he is incapable of being sued for it at law (*c*); but, in respect of his equitable liability for it, proof of it will be admitted in his bankruptcy (*d*); and, perhaps, a mortgage granted by him to secure it might be held valid on the same principle (*e*). But such a fraud will not affect a third party who claims without notice under a disposition made after the infant has attained full age (*f*).

In obtaining a lease.

182. A lease obtained by an infant by a fraudulent misrepresentation that he was of age may be ordered to be cancelled (*g*).

Misrepresentation must be explicit.

183. The misrepresentation must be explicit, and will not be constituted by mere inferences suggested by or drawn from the infant's conduct (*h*).

Misrepresentation must be misleading.

184. The misrepresentation will not bind or prejudice the infant if the person with whom he is dealing is in fact aware of his infancy (*i*).

interest, commission, or other payment in respect of the loan is to be deemed part of the loan (Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 5). See also p. 172, *post*. As to the presumption of knowledge of infancy established by this Act, see title EVIDENCE, Vol. XIII., p. 507, note (*m*).

(*t*) *Watts* v. *Creswell* (1714), Vin. Abr., tit. Enfant (N.), p. 415; *Johnson* v. *Pye* (1665), 1 Sid. 258; *Evroy* v. *Nicholas* (1733), 2 Eq. Cas. Abr. 488; *Buckinghamshire (Earl)* v. *Drury* (1761), 2 Eden, 60, H. L., *per* Lord MANSFIELD, at pp. 72, 73; *Beckett* v. *Cordley* (1784), 1 Bro. C. C. 353; *Nelson* v. *Stocker* (1859), 4 De G. & J. 458, C. A., *per* TURNER, L.J., at p. 464; *Lemprière* v. *Lange* (1879), 12 Ch. D. 675. See also title ESTOPPEL, Vol. XIII., p. 380. As to misrepresentation, generally, see title MISREPRESENTATION AND FRAUD.

(*a*) *Cory* v. *Gertcken* (1816), 2 Madd. 40; *Overton* v. *Banister* (1844), 3 Hare, 503.

(*b*) *Wright* v. *Snowe* (1848), 2 De G. & Sm. 321. A general release by an infant is worth nothing in law (*Overton* v. *Banister*, *supra*, *per* WIGRAM, V.-C., at p. 506).

(*c*) *Johnson* v. *Pye*, *supra*; *Price* v. *Hewett* (1852), 8 Exch. 146; *Liverpool Adelphi Loan Association* v. *Fairhurst* (1854), 9 Exch. 422, 430; *De Roo* v. *Foster* (1862), 12 C. B. (N. S.) 272; *Inman* v. *Inman* (1873), L. R. 15 Eq. 260; *Levene* v. *Brougham* (1909), 25 T. L. R. 265, C. A.

(*d*) *Re King*, *Ex parte Unity Joint Stock Mutual Banking Association* (1858), 3 De G. & J. 63, C. A.; *Maclean* v. *Dummett* (1869), 22 L. T. 710, P. C.; *Re Jones*, *Ex parte Jones* (1881), 18 Ch. D. 109, C. A., *per* LUSH, L.J., at p. 125.

(*e*) *Teynham* (*Lord*) v. *Webb* (1751), 2 Ves. Sen. 198, *per* Lord HARDWICKE, L.C., at p. 212; but see *Nottingham Permanent Benefit Building Society* v. *Thurstan*, [1903] A. C. 6.

(*f*) *Inman* v. *Inman*, *supra*.

(*g*) *Lemprière* v. *Lange*, *supra*.

(*h*) *Stikeman* v. *Dawson* (1847), 1 De G. & Sm. 90; *Maclean* v. *Dummett*, *supra*; *Miller* v. *Blankley* (1878), 38 L. T. 527; *Re Jones*, *Ex parte Jones*, *supra*, at p. 121.

(*i*) *Nelson* v. *Stocker*, *supra*, *per* TURNER, L.J., at p. 465; and see note (*s*), p. 6[illegible] *ante*.

SUB-SECT. 5.—*Liability of Adult contracting with Infant.*

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185. Where an adult contracts with an infant, he is bound by the contract in spite of the non-liability of the infant, if the latter elects to enforce the contract (*k*); so that an action can be brought upon it, either on behalf of the infant during his infancy (*l*), or by the infant himself after he attains full age (*m*). But, on the ground of want of mutuality, an infant cannot claim specific performance of a contract made with him (*n*).

Liability of adult contracting with infant.

SECT. 2.—*Particular Contracts.*

SUB-SECT. 1.—*For Necessaries.*

186. The law considers it to be clearly for the benefit of an infant that he should be capable of binding himself to pay for the supply of the necessaries of life to himself and members of his household (*o*). In order to maintain an action against an infant for necessaries, it must be shown that they were of a nature suitable to his condition in life and actually required by him at the time, and that he was not at the time otherwise sufficiently provided with them (*p*). Where necessaries are sold and delivered

Liability for necessaries.

(*k*) *Davies* v. *Manington* (1658), 2 Sid. 109; *Coan* v. *Boules* (1690), 1 Show. 165, *per* HOLT, C.J., at p. 171; *Clayton* v. *Ashdown* (1714), Vin. Abr., tit. Enfant (G. 4); *Holt* v. *Ward Clarencieux* (1732), 2 Stra. 937, 939; *Shannon* v. *Bradstreet* (1803), 1 Sch. & Lef. 52, *per* Lord REDESDALE, L.C., at p. 58; *Warwick* v. *Bruce* (1813), 2 M. & S. 205; *Re Smith's Trusts* (1890), 25 L. R. Ir. 439, *per* CHATTERTON, V.-C., at p. 443. The Infants Relief Act, 1874 (37 & 38 Vict. c. 62), which with certain exceptions makes a contract by an infant void (see pp. 63 *et seq.*, *ante*), does not appear to avoid the contract against the other party, if he is of age, and the infant sues him upon it, but the point has never been actually decided. As to an infant's banking account, see title BANKERS AND BANKING, Vol. I., pp. 587, 590, 631.

(*l*) *Forrester's Case* (1661), 1 Sid. 41; *Farnham* v. *Atkins* (1670), 1 Sid. 446; *Bruce* v. *Warwick* (1815), 6 Taunt. 118, Ex. Ch.; *Holliday* v. *Atkinson* (1826), 5 B. & C. 501.

(*m*) *Holt* v. *Ward Clarencieux*, *supra*; *Re Smith's Trusts*, *supra*.

(*n*) *Flight* v. *Bolland* (1828), 4 Russ. 298; and see title SPECIFIC PERFORMANCE.

(*o*) Co. Litt. 172 a; Bac. Abr., tit. Infancy and Age (I.) 1, 7th ed., pp. 354 *et seq.*; Com. Dig., tit. Enfant (B. 5); *Whittingham* v. *Hill* (1618), Cro. Jac. 494; *Rainsford* v. *Fenwick* (1670), Cart. 215; *Turner* v. *Trisby* (1719), 1 Stra. 168; *Hands* v. *Slaney* (1800), 8 Term Rep. 578; *Chapple* v. *Cooper* (1844), 13 M. & W. 252; Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1. An action against an infant for necessaries is usually spoken of as a case of enforcing a contract against the infant; but the basis of the action is hardly contract. An infant, like a lunatic (see *Re Rhodes*, *Rhodes* v. *Rhodes* (1890), 44 Ch. D. 94, C. A., *per* COTTON, L.J., at p. 105; *Re J.* (*a Person of Unsound Mind*), [1909] 1 Ch. 574, 577, C. A.), is incapable of making a contract of purchase in the strict sense of the words. But if a man satisfies the needs of the infant or lunatic by the supply of necessaries, the law will imply an obligation to repay him for the services so rendered, and will enforce that obligation against the estate of the infant or lunatic. The real foundation of the action has been said to be, therefore, an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words, the obligation arises *re* and not *consensu* (*Nash* v. *Inman*, [1908] 2 K. B. 1, C. A., *per* FLETCHER MOULTON, L.J., at p. 8; see, however, *per* BUCKLEY, L.J., at p. 12; and *Re J.* (*a Person of Unsound Mind*), *supra*).

(*p*) *Bainbridge* v. *Pickering* (1779), 2 Wm. Bl. 1325; *Ford* v. *Fothergill* (1794), 1 Esp. 211; *Hands* v. *Slaney*, *supra*; *Cook* v. *Deaton* (1827), 3 C. & P. 114; *Story* v. *Pery* (1831), 4 C. & P. 526; *Burghart* v. *Angerstein* (1834), 6 C. & P. 690;

SECT. 2. Particular Contracts.

to an infant, he must pay a reasonable price for them (*q*). The fact of his having a sufficient allowance does not preclude him from contracting for necessaries on credit (*r*).

Necessaries of life.

187. Certain things are clearly necessaries, such as food, clothing, medicine (*s*) and lodging (*t*).

Articles suitable to position.

Articles suitable to and proper for an infant's position in life, though not actually necessary to his existence, are recognised as necessaries (*a*).

Funeral of relative.

The cost of the funeral of a member of the infant's family is a necessary expenditure (*b*).

Education.

Education suitable to the infant's prospects in life is a necessary for which he can bind himself (*c*).

Legal proceedings.

The protection of an infant from legal proceedings, and the protection of his interests by legal instruments, or legal proceedings, have been held to be necessaries (*d*).

Luxuries.

Articles which are mere luxuries, as distinguished from luxurious articles of utility (*e*), are not recognised as necessaries, even for an infant in a position in which they are commonly enjoyed (*f*).

Dalton v. *Gib* (1839), 5 Bing. (N. C.) 198; *Peters* v. *Fleming* (1840), 6 M. & W. 42, *per* PARKE, B., at p. 46; *Foster* v. *Redgrave* (1867), cited in *Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, 35, n. (8); *Barnes* v. *Toye* (1884), 13 Q. B. D. 410; *Johnstone* v. *Marks* (1887), 19 Q. B. D. 509; *Nash* v. *Inman*, [1908] 2 K. B. 1, C. A. As to the liability of a lunatic not so found for necessaries, see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2, where "necessaries" means goods suitable to the condition in life of the person to whom they are sold and delivered, and to his actual requirements at the time of the sale and delivery; and see title SALE OF GOODS.

(*r*) *Burghart* v. *Hall* (1839), 4 M. & W. 727, overruling *Mortara* v. *Hall* (1834), 6 Sim. 465; see *Barnes* v. *Toye*, *supra*, at p. 412.

(*s*) Co. Litt. 172 a; Com. Dig., tit. Enfant (B. 5); 1 Bl. Com. 466; *Pickering* v. *Gunning* (1628), Palm. 528; *Huggins* v. *Wiseman* (1691), Carth. 110; *Turberville* v. *Whitehouse* (1823), 1 C. & P. 94.

(*t*) *Lowe* v. *Griffith* (1835), 1 Scott, 458, *per* TINDAL, C.J., at p. 460.

(*a*) *Peters* v. *Fleming*, *supra*; *Chapple* v. *Cooper* (1844), 13 M. & W. 252, 258. The following articles have been allowed as necessaries:—Livery for the servant of an infant officer in the army (*Hands* v. *Slaney* (1800), 8 Term Rep. 578); regimental uniform (*Coates* v. *Wilson* (1804), 5 Esp. 152); watch-chain, pins and rings (*Peters* v. *Fleming*, *supra*); presents to a lady who afterwards became the infant's wife (*Jenner* v. *Walker* (1868), 19 L. T. 398); racing bicycle (*Clyde Cycle Co.* v. *Hargreaves* (1898), 78 L. T. 296).

(*b*) *Chapple* v. *Cooper*, *supra*.

(*c*) Co. Litt. 172 a; Bac. Abr., tit. Infancy and Age (I.) 1, 7th ed., pp. 355, 357; 1 Bl. Com. 466; *Pickering* v. *Gunning*, *supra*; *Chapple* v. *Cooper*, *supra*, at p. 258; *De Francesco* v. *Barnum* (1890), 45 Ch. D. 430, *per* FRY, L.J., at p. 439; *Walter* v. *Everard*, [1891] 2 Q. B. 369, C. A., *per* Lord ESHER, M.R., at p. 374.

(*d*) *Clarke* v. *Leslie* (1803), 5 Esp. 28; *Ex parte M'Key* (1810), 1 Ball & B. 405; *Helps* v. *Clayton* (1864), 17 C. B. (N. S.) 553; *Pritchard* v. *Roberts* (1873), L. R. 17 Eq. 222; *Re Jones, an Infant*, [1883] W. N. 14; *Prince* v. *Haworth* (1904), 20 T. L. R. 313.

(*e*) *Chapple* v. *Cooper*, *supra*, at p. 258.

(*f*) *Ibid.*; *Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, Ex. Ch. The following items have been disallowed:—Goods for sale in the infant's shop (*Whywall* v. *Champion* (1737), 2 Stra. 1083); cockades for the soldiers in the company of an infant captain (*Hands* v. *Slaney*, *supra*); expensive chronometer for a lieutenant in the navy (*Berolles* v. *Ramsay* (1815), Holt (N. P.), 77); expensive and superfluous clothes (*Burghart* v. *Angerstein* (1834), 6 C. & P. 690); hire and repair of a fancy carriage (*Charters* v. *Bayntun* (1835), 7 C. & P. 52); hire o

In a case of dispute the question of what were necessaries in the particular case is a mixed question of law and fact. The judge decides whether the articles may in the circumstances be considered necessaries, and the jury find whether they were so in fact (*g*).

Loans to infants to provide necessaries.

188. Where a sum of money is advanced to an infant to enable him to provide himself with necessaries, he cannot give a binding security for it (*h*), nor draw nor accept a bill in respect of it (*i*). But the lender stands in equity in the place of the supplier of the necessaries, and can accordingly maintain an action for the money (*k*); and his right in this respect is not prejudiced by the infant having given an invalid security for it (*l*). Army agents advancing reasonable sums to an infant officer for regimental purposes will be entitled to a lien for them on money belonging to him (*m*).

SUB-SECT. 2.—*Of Apprenticeship and Service.*

(i.) *In General.*

Contracts of apprenticeship and service.

189. Inasmuch as it is desirable that an infant should employ himself in labour or business, he can bind himself by a contract of apprenticeship, and of service generally (*n*).

horses (*Harrison* v. *Fane* (1840), 1 Man. & G. 550); dinners, confectionery and fruit for infant undergraduate (*Brooker* v. *Scott* (1843), 11 M. & W. 67; *Wharton* v. *Mackenzie*, *Cripps* v. *Hills* (1844), 5 Q. B. 606); cigars and tobacco (*Bryant* v. *Richardson* (1866), cited in *Ryder* v. *Wombwell* (1868), L. R. 3 Exch. 90, at p. 93, n. (3)); expensive jewellery (*Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, Ex. Ch.); commission to a theatrical agent by an infant music-hall performer for obtaining engagements (*Lofthouse* v. *Brown*, [1898] W. N. 52); presents to a lady who did not become the infant's wife (*Hewlings* v. *Graham* (1901), 70 L. J. (CH.) 568).

(*g*) *Rainsford* v. *Fenwick* (1670), Cart. 215; *Maddox* v. *Miller* (1813), 1 M. & S. 738; *Peters* v. *Fleming* (1840), 6 M. & W. 42; *Harrison* v. *Fane* (1840), 1 Man. & G. 550; *Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, 40, Ex. Ch.; *Jenner* v. *Walker* (1868), 19 L. T. 398.

(*h*) *Ayliff* v. *Archdale* (1602), Cro. Eliz. 920; *Rearsby* v. *Cuffer* (1613), Godb. 219; *Probart* v. *Knouth* (1793), 2 Esp. 472, n.; *Martin* v. *Gale* (1876), 4 Ch. D. 428; *Walkden* v. *Hartley and Cavell* (1886), 2 T. L. R. 767; *Walter* v. *Everard*, [1891] 2 Q. B. 369, C. A. See also pp. 49, 63, *ante*; and title BONDS, Vol. III., p. 83.

(*i*) *Russel* v. *Lee* (1662), 1 Lev. 86; *Earle* v. *Peale* (1711), 10 Mod. Rep. 67; *Trueman* v. *Hurst* (1785), 1 Term Rep. 40; *Williamson* v. *Watts* (1808), 1 Camp. 552; *Bateman* v. *Kingston* (1880), 6 L. R. Ir. 328; *Re Soltykoff*, *Ex parte Margrett*, [1891] 1 Q. B. 413, C. A. See also title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 490.

(*k*) *Marlow* v. *Pitfeild* (1719), 1 P. Wms. 558; *Re National Permanent Benefit Building Society*, *Ex parte Williamson* (1869), 5 Ch. App. 309, *per* GIFFARD, L.J., at p. 313; *Martin* v. *Gale*, *supra*; though he could not formerly have done so at law (*Darby* v. *Boucher* (1693), 1 Salk. 279); and compare title EQUITY, Vol. XIII., pp. 149, 150.

(*l*) *Cooper* v. *Simmons* (1862), 7 H. & N. 707, *per* MARTIN, B., at p. 719; *Martin* v. *Gale*, *supra*; *Walter* v. *Everard*, *supra*.

(*m*) *Lawrie* v. *Bankes* (1858), 4 K. & J. 142.

(*n*) Burn, Justice of the Peace, 30th ed., Vol. I., p. 280 b; Vol. IV., pp. 209 *et seq.*; *Gylbert* v. *Fletcher* (1630), Cro. Car. 179; *R.* v. *Evered* (1777), Cald. Mag. Cas. 26, 28; *R.* v. *Saltren* (1784), Cald. Mag. Cas. 444; *R.* v. *Arundel* (*Inhabitants*) (1816), 5 M. & S. 257; *R.* v. *Arnesby* (*Inhabitants*) (1820), 3 B. & Ald. 584, 586; *R.* v. *Chillesford* (*Inhabitants*), *R.* v. *Winslow* (*Inhabitants*) (1825), 4 B. & C.

SECT. 2. Particular Contracts.

(ii.) *Apprenticeship.*

Apprenticeship.

190. Apprenticeship is usually entered into by a deed, under which the infant is bound to serve a master faithfully in a trade or business for a considerable period, and the master undertakes to give to the apprentice instruction therein, and either to maintain him, or to pay him wages. The validity of the contract depends on whether it is or is not upon the whole beneficial to the infant (*o*); and the law takes care that his interests are properly protected (*p*). The contract must not impose any penalty on the infant (*q*), nor provide for the cessation of his work, and his maintenance or wages at the sole will of the master (*r*), nor altogether omit any provision for his maintenance or wages (*s*), nor otherwise contain stipulations so much to the detriment of the infant as to render it unfair that he should be bound by it (*t*).

Execution of deed.

The deed or instrument of apprenticeship must be executed by the infant himself, since no one else has a right to bind him (*a*); but his father or mother should also execute it in order to covenant for his due performance of the contract, since, in the absence of local custom, an infant apprentice cannot be sued on his own covenant (*b*).

Liability on covenants.

The covenants entered into by the master, and also those entered into on behalf of or, where there is a special custom, by the infant, are mutual and independent, entitling each party to his remedy for

94; *Wood* v. *Fenwick* (1842), 10 M. & W. 195; *Wise* v. *Wilson* (1845), 1 Car. & Kir. 662; *R.* v. *Lord* (1848), 12 Q. B. 757, 765; *Cooper* v. *Simmons* (1862), 7 H. & N. 707, 721; *De Francesco* v. *Barnum* (1890), 45 Ch. D. 430, *per* FRY, L.J., at p. 439. A corporation may become master to an infant apprentice (*Burnley Equitable Co-operative and Industrial Society* v. *Casson*, [1891] 1 Q. B. 75). As to an infant becoming master to an apprentice, see p. 56, *ante*. See also title MASTER AND SERVANT.

(*o*) *De Francesco* v. *Barnum*, *supra*, at p. 439.

(*p*) *Keane* v. *Boycott* (1795), 2 Hy. Bl. 511; *R.* v. *Arundel* (*Inhabitants*) (1816), 5 M. & S. 257.

(*q*) Co. Litt. 172 a; *Meakin* v. *Morris* (1884), 12 Q. B. D. 352, *per* Lord COLERIDGE, C.J., at p. 354; *De Francesco* v. *Barnum*, *supra*, *per* FRY, L.J., at p. 439; *Farmers and Cleveland Dairies Co.* v. *Riley* (1893), 9 T. L. R. 260.

(*r*) *R.* v. *Lord*, *supra*.

(*s*) *De Francesco* v. *Barnum*, *supra*, at pp. 440, 442.

(*t*) *Meakin* v. *Morris*, *supra*; *Corn* v. *Matthews*, [1893] 1 Q. B. 310, C. A., *per* A. L. SMITH, L.J., at p. 316; *Green* v. *Thompson*, [1899] 2 Q. B. 1, *per* DARLING, J., at p. 5.

(*a*) *R.* v. *Margram* (*Inhabitants*) (1793), 5 Term Rep. 153; *R.* v. *Cromford* (*Inhabitants*) (1806), 8 East, 25; *R.* v. *Arnesby* (*Inhabitants*) (1820), 3 B. & Ald. 584; *R.* v. *Chillesford* (*Inhabitants*), *R.* v. *Winslow* (*Inhabitants*) (1825), 4 B. & C. 94; *St. Nicholas, Rochester* (*Churchwardens etc.*) v. *St. Botolph-without-Bishopsgate* (*Churchwardens etc.*) (1862), 12 C. B. (N. S.) 645. If the infant is illiterate, someone may sign for him (*R.* v. *Longnor* (*Inhabitants*) (1833), 4 B. & Ad. 647).

(*b*) *Whittingham* v. *Hill* (1618), Cro. Jac. 494; *Gylbert* v. *Fletcher* (1630), Cro. Car. 179; *Lylly's Case* (1702), 7 Mod. Rep. 15; *Branch* v. *Ewington* (1780), 2 Doug. (K. B.) 518; *De Francesco* v. *Barnum* (1889), 43 Ch. D. 165, *per* CHITTY, J., at p. 171; except in the case of a covenant which only takes effect after the expiration of the term of apprenticeship (*Gadd* v. *Thompson*, [1911] 1 K. B. 304). By the custom of London an infant apprentice above the age of fourteen can bind himself by his covenants in the deed of apprenticeship (*Stanton's Case* (1583), Moore (K. B.), 135; *Horn* v. *Chandler* (1670), 1 Mod. Rep. 271).

a breach of them (*c*). The covenants by the father are not released by the infant electing not to be bound by the deed (*d*), but they may be released by a change in the circumstances of the master (*e*). A parent who enters into a covenant on behalf of an infant apprentice is liable for a breach of the covenant committed after the apprentice has attained full age (*f*). The master is not released by misconduct on the part of the apprentice if it is only slight (*g*), but he is released if it is of a gross character, and causes him actual injury, or renders it impossible for him to fulfil his part of the contract (*h*). He is liable in damages if he changes his place of business or otherwise alters the circumstances to the detriment of the apprentice (*i*).

Dissolution and termination of apprenticeship.

191. The infant has no power to dissolve the apprenticeship (*k*), but it may be determined with the mutual consent of all parties (*l*); and it is terminated if the apprentice becomes permanently ill or dies (*m*), or if the master dies (*n*).

Bankruptcy of master.

192. If the master becomes bankrupt, either he or the apprentice may put an end to the contract by notice to the trustee in the bankruptcy (*o*); and in that case the trustee may either return to the apprentice a reasonable part of any premium paid by him or on his behalf, or may transfer the indenture of apprenticeship to another master (*p*).

Return of premium.

Where the contract is terminated otherwise than by bankruptcy, no part of the premium will as a rule be returnable to the apprentice (*q*).

(*c*) *Winstone* v. *Linn* (1823), 1 B. & C. 460, *per* BAYLEY, J., at p. 467.

(*d*) *Cuming* v. *Hill* (1819), 3 B. & Ald. 59. The infant may so elect on attaining full age (*Ex parte Davis* (*M. A.*) (1794), 5 Term Rep. 715; *Wray* v. *West* (1866), 15 L. T. 180), but does not do so merely by absenting himself from the service (*Gray* v. *Cookson* (1812), 16 East, 13).

(*e*) *Ellen* v. *Topp* (1851), 6 Exch. 424. Where an apprentice is bound to two masters, it is a question of construction of the contract of apprenticeship whether he remains bound to one after they have dissolved partnership (*Lloyd* v. *Blackburn* (1842), 9 M. & W. 363; *Popham* v. *Jones* (1853), 13 C. B. 225; *Brook* v. *Dawson* (1869), 20 L. T. 611; *Couchman* v. *Sillar* (1870), 18 W. R. 757; *Eaton* v. *Western* (1882), 9 Q. B. D. 636, C. A.).

(*f*) *Cuming* v. *Hill*, *supra*.

(*g*) *Winstone* v. *Linn*, *supra*; *Wise* v. *Wilson* (1845), 1 Car. & Kir. 662, *per* Lord DENMAN, C.J., at p. 669; *Phillips* v. *Clift* (1859), 4 H. & N. 168.

(*h*) *Hughes* v. *Humphreys* (1827), 6 B. & C. 680; *Wise* v. *Wilson*, *supra*; *Cox* v. *Mathews* (1861), 2 F. & F. 397; *Raymond* v. *Minton* (1866), L. R. 1 Exch. 244; *Westwick* v. *Theodor* (1875), L. R. 10 Q. B. 224; *Learoyd* v. *Brook*, [1891] 1 Q. B. 431.

(*i*) *Eaton* v. *Western*, *supra*, overruling *Royce* v. *Charlton* (1881), 8 Q. B. D. 1.

(*k*) *R.* v. *Wigston* (*Inhabitants*) (1824), 3 B. & C. 484.

(*l*) *R.* v. *Weddington* (*Inhabitants*) (1774), Burr. S. C. 766; *R.* v. *Spawnton* (*Inhabitants*) (1775), Burr. S. C. 801.

(*m*) *Boast* v. *Firth* (1868), L. R. 4 C. P. 1.

(*n*) *Baxter* v. *Burfield* (1747), 2 Stra. 1266; *R.* v. *Chirk* (*Inhabitants*) (1774), Burr. S. C. 782; *Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78. But the deed may be so drawn as to bind the apprentice to continue to serve the master's executors (*Cooper* v. *Simmons* (1862), 7 H. & N. 707).

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 41 (1).

(*p*) *Ibid.*, s. 41 (1), (2). As to the relationship of solicitor and articled clerk, see title SOLICITORS. See also title MASTER AND SERVANT.

(*q*) *Hale* v. *Webb* (1786), 2 Bro. C. C. 78; *Whincup* v. *Hughes*, *supra*; *Learoyd*

SECT. 2. Particular Contracts.

Injunction.

Jurisdiction of justices.

193. An injunction cannot be obtained by the father of an infant apprentice to restrain the master from pursuing his remedies at law in case of the infant's default (*r*), nor against the infant to restrain a breach by him of the contract of apprenticeship during its currency (*s*). But in case of misconduct by an apprentice to whom the Employers and Workmen Act, 1875 (*t*), applies (*u*), the master can apply to a court of summary jurisdiction as defined by that Act (*a*); and the court may order the apprentice to perform his duties, and in default may sentence him to imprisonment for not more than fourteen days (*b*). The court has also general power to decide all disputes between masters and apprentices who come under the provisions of that Act (*c*), and to mulct in damages any person who is liable under the deed of apprenticeship for the default of the apprentice (*d*).

Compensation to apprentices.

194. An apprentice is included in the definition of "workman" in the Workmen's Compensation Act, 1906 (*e*), and is entitled to the benefits thereof (*f*). But this does not prevent the court from inquiring whether an agreement entered into by an infant apprentice under that Act is for his benefit or not; and if it is not, it will not be enforced (*g*).

(iii.) *Service.*

Provisions of ordinary contracts of service.

195. An ordinary contract of service entered into by an infant is construed according to the same general principles as a contract of apprenticeship (*h*). The contract must not provide for the cessation of the infant's work and wages at the will of the master (*i*), nor

v. *Brook*, [1891] 1 Q. B. 431, 434, 435. The former practice under which the court in the exercise of its jurisdiction over its own officers sometimes ordered a return of the premium by a solicitor in the case of an articled clerk (*Ex parte Prankerd* (1819), 3 B. & Ald. 257; *Re Harper*, *Ex parte Bayley* (1829), 9 B. & C. 691; *Hirst* v. *Tolson* (1850), 2 Mac. & G. 134) is no longer followed (*Re Thompson* (1848), 1 Exch. 864; *Craven* v. *Stubbins* (1864), 34 L. J. (CH.) 126). But in cases coming within the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), the court of summary jurisdiction within the meaning of that Act (*ibid.*, s. 10) may order repayment of the whole or part of the premium paid on the binding of an apprentice (*ibid.*, s. 6).

(*r*) *Argles* v. *Heaseman* (1739), 1 Atk. 518. For the practice in applying for an injunction, see title INJUNCTION, pp. 271 *et seq.*, *post.*

(*s*) *De Francesco* v. *Barnum* (1889), 43 Ch. D. 165. *Secus*, as to acts or omissions after the apprenticeship shall have ceased (*Gadd* v. *Thompson*, [1911] 1 K. B. 304).

(*t*) 38 & 39 Vict. c. 90.

(*u*) *Ibid.*, ss. 10, 12. The Act extends to apprentices to the sea service (Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 & 44 Vict. c. 16), s. 11).

(*a*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 10; see title MASTER AND SERVANT. As to courts of summary jurisdiction generally, see title MAGISTRATES.

(*b*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 6.

(*c*) *Ibid.*, ss. 5—7.

(*d*) *Ibid.*, s. 7.

(*e*) 6 Edw. 7, c. 58.

(*f*) *Ibid.*, s. 13.

(*g*) *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. 225, C. A.; decided under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37).

(*h*) *Wise* v. *Wilson* (1845), 1 Car. & Kir. 662; see p. 70, *ante*.

(*i*) *R.* v. *Lord* (1848), 12 Q. B. 757, *per* Lord DENMAN, C.J., at p. 765.

preclude him from claiming compensation for injury (*k*), nor contain unusual or unnecessary restrictions (*l*). But it may contain provisions for the cessation of wages, which are usual in contracts by adults in respect of the same description of service, or are necessary for the protection of the master under the existing conditions of trade (*m*), and also provisions for the infant becoming a member of an insurance society (*n*).

Continuance of service after attaining full age.

196. If an infant continues to serve under a contract of service after he has attained full age, it will be assumed that he has entered into a new contract on similar terms (*o*), and an injunction will be granted to restrain him from a breach of its conditions (*p*).

SUB-SECT. 3.—*Trade Debts.*

Liability for trade debts.

197. The non-liability of an infant for debts extends to a debt incurred by him in the course of trading (*q*), unless he obtains credit for it by a fraudulent misrepresentation as to his age (*r*); but the fact of his trading is not in itself a representation by him that he is of age (*s*). In the absence of such fraudulent misrepresentation he cannot be made bankrupt in respect of trade debts (*t*). On the other hand, he can enforce a trading contract made with him by an adult party (*a*).

SUB-SECT. 4.—*Liability where Infant and Adult are Joint Contractors.*

Liability of co-contractor.

198. Where an adult and an infant enter jointly into a contract which does not bind the infant, the adult is not bound by it, if it

(*k*) *Flower* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 65, C. A.

(*l*) *Leng (Sir W. C.) & Co., Ltd.* v. *Andrews*, [1909] 1 Ch. 763, C. A., *per* COZENS-HARDY, M.R., at p. 769. Such restrictions do not invalidate the rest of the contract if they are severable from it (*Bromley* v. *Smith*, [1909] 2 K. B. 235).

(*m*) *Leslie* v. *Fitzpatrick* (1877), 3 Q. B. D. 229.

(*n*) *Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 482, C. A.

(*o*) *Cornwall* v. *Hawkins* (1872), 41 L. J. (CH.) 435. See also *Walton* v. *Everington* (1885), 1 T. L. R. 396; *Capes* v. *Hutton* (1826), 2 Russ. 357. As to the liability of an infant master continuing employment after attaining full age, see *Thomas* v. *Waldo* (1858), 1 F. & F. 173; *Brown* v. *Harper* (1893), 68 L. T. 488.

(*p*) *Fellows* v. *Wood* (1888), 59 L. T. 513; *Evans* v. *Ware*, [1892] 3 Ch. 502, *per* NORTH, J., at p. 505. Whether such an injunction would be granted during infancy has not been decided (*De Francesco* v. *Barnum* (1889), 43 Ch. D. 165, where CHITTY, J., at p. 174, said that he was satisfied that in the case of *Fellows* v. *Wood*, *supra*, it had been granted after the infant had attained full age, but that at the same time a contract of service did not necessarily stand in this respect on the same footing as a contract of apprenticeship, under which such an injunction would not be granted); see *Gadd* v. *Thompson*, [1911] 1 K. B. 304, and pp. 70, 72, *ante*.

(*q*) *Whittingham* v. *Hill* (1618), Cro. Jac. 494; *Whywall* v. *Champion* (1737), 2 Stra. 1083; *Hitchcock* v. *Tyson* (1786), 2 Esp. 481, n. (a); *Dilk* v. *Keighley* (1796), 2 Esp. 480; *Thornton* v. *Illingworth* (1824), 2 B. & C. 824; *Re Jones, Ex parte Jones* (1881), 18 Ch. 109, C. A., *per* LUSH, L.J., at p. 124.

(*r*) See p. 66, *ante*.

(*s*) *Re Jones, Ex parte Jones*, *supra*, *per* JESSEL, M.R., at p. 121; see *Weaver* v. *Stokes* (1836), 1 M. & W. 203.

(*t*) *Re Jones, Ex parte Jones*, *supra*; and see pp. 54, 55, *ante*.

(*a*) See p. 67, *ante*.

SECT. 2. Particular Contracts.

can only be performed by them jointly (*b*). If it can be performed by the adult without the infant, then, whether it is absolutely void or only voidable as regards the latter, the adult is liable under it (*c*). But in the case of a contract which is only voidable on the part of the infant, the joint contractor can be sued alone only on proof that the infant has avoided the contract (*d*).

Specific performance.

Where specific performance of a contract cannot be ordered against an infant, it will not be ordered against an adult co-contractor with him (*e*); but where a bill of exchange is drawn or indorsed by an infant, the holder of the bill is entitled to receive payment thereof, and to enforce it against any other party thereto (*f*).

Part IV.—Torts.

General liability for torts.

199. An infant above the age of seven years (*g*) is not protected from the consequences of his own fraud (*h*), and is generally liable for a tort committed by him, which is not directly founded upon a contract on which he cannot be sued (*i*).

Particular torts.

An infant can accordingly be sued for the return of money which he has embezzled (*k*), for trespass (*l*), for detinue (*m*), and for slander (*n*), for fraudulently passing off spurious goods as being of

(*b*) *Gill* v. *Russells* (1674), Freem. (K. B.) 62, 63, 139.

(*c*) *Salmon* v. *Smith* (1669), 1 Wms. Saund. 202, 207 a, 207 b, n. (l); *Gill* v. *Russells, supra*; *Chandler* v. *Parkes* (1800), 3 Esp. 76; *Jaffray* v. *Frebain* (1803), 5 Esp. 47; *Haw* v. *Ogle* (1811), 4 Taunt. 10; *Burgess* v. *Merrill* (1812), 4 Taunt. 468; *Gillow* v. *Lillie* (1835), 1 Bing. (N. C.) 695; *Boyle* v. *Webster* (1852), 17 Q. B. 950.

(*d*) *Gibbs* v. *Merrill* (1810), 3 Taunt. 307, *per* Lord MANSFIELD, C.J., at p. 313.

(*e*) *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. 683, C. A.

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 22 (2); see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 490.

(*g*) Bac. Abr., tit. Infancy and Age (A.), (H.), 7th ed., pp. 341, 351 *et seq.*

(*h*) *Watts* v. *Creswell* (1714), 9 Vin. Abr., tit. Enfant, p. 415; *Clere* v. *Bedford* (*Earl*) (1723), cited 9 Mod. Rep. 38, and in 13 Vin. Abr., tit. Fraud, (Q.), p. 536; *Evroy* v. *Nicholas* (1733), 2 Eq. Cas. Abr. 488, 489; S. C., *sub nom. Esron* v. *Nicholas*, 1 De G. & Sm. 118; *Teynham* (*Lord*) v. *Webb* (1751), 2 Ves. Sen. 197, *per* Lord HARDWICKE, L.C., at p. 212; *Buckinghamshire* (*Earl*) v. *Drury* (1761), 2 Eden, 60, H. L., *per* Lord MANSFIELD, at p. 72; *Clarke* v. *Cobley* (1789), 2 Cox, Eq. Cas. 173, 174; *Cory* v. *Gertcken* (1816), 2 Madd. 40; see also p. 66 *ante*; and as to criminal acts of infants, see pp. 176 *et seq.*, *post*; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 239.

(*i*) Bac. Abr., tit. Infancy and Age, (H.), 7th ed., p. 354; *Bristow* v. *Eastman* (1794), 1 Esp. 172, *per* Lord KENYON, C.J., at p. 173. As to the classification and definition of torts, see generally, title TORT; and as to negligence and contributory negligence on the part of infants, see title NEGLIGENCE.

(*k*) *Bristow* v. *Eastman, supra*; *Re Seager, Seeley* v. *Briggs* (1889), 60 L. T. 665.

(*l*) Bac. Abr., tit. Infancy and Age (H.), 7th ed., p. 353; *Johnson* v. *Pye* (1665), 1 Sid. 258.

(*m*) *Mills* v. *Graham* (1804), 1 Bos. & P. (N. R.) 140; *Burton* v. *Levey* (1891), 7 T. L. R. 248.

(*n*) *Defries* v. *Davies* (1835), 1 Scott, 594.

the plaintiff's manufacture (*o*), and for representing his business as being connected with the plaintiff's business (*p*).

Tort founded on contract.

An infant is not liable for a tort which is founded on a contract on which he cannot be sued (*q*), as in the case of the warranty of a horse (*a*); but he is liable for a tort committed in excess of the terms of a contract (*b*).

An infant may be a bailee, and is therefore liable for the consequences of fraudulent conversion to his own use of goods received by him in that capacity (*c*).

Part V.—Property.

SECT. 1.—*Acquisition.*

SUB-SECT. 1.—*In General.*

Acquisition of property.

200. The acquisition of property being generally beneficial (*d*), an infant can take property, both real and personal, in any manner whatever (*e*), either by descent (*f*), intestacy (*g*) or will (*h*), or by purchase or gift or other assurance *inter vivos* (*i*), except where it is necessarily to his prejudice to do so (*j*). In the case of real property taken by descent, the exception as to prejudicial property does not apply, since a person cannot disclaim property which descends to him as heir (*k*). In the case of onerous property taken under an intestacy or a will, the court will, upon application, disclaim on

Disclaimer.

(*o*) *Chubb* v. *Griffiths* (1865), 35 Beav. 127.

(*p*) *Woolf* v. *Woolf*, [1899] 1 Ch. 343.

(*q*) *Manby* v. *Scott* (1663), 1 Sid. 109, 129, Ex. Ch.; *Jennings* v. *Rundall* (1799), 8 Term Rep. 335, *per* Lord KENYON, C.J., at p. 336. A plaintiff cannot convert an action founded on contract into an action for tort so as to charge an infant (*Jennings* v. *Rundall*, *supra*; *Green* v. *Greenbank* (1816), 2 Marsh. 485; *Burnard* v. *Haggis* (1863), 14 C. B. (N. S.) 45, *per* BYLES, J. at pp. 53, 54).

(*a*) *Howlett* v. *Haswell* (1814), 4 Camp. 118; *Green* v. *Greenbank*, *supra*.

(*b*) *Burnard* v. *Haggis*, *supra*; *Walley* v. *Holt* (1876), 35 L. T. 631.

(*c*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 3; *R.* v. *McDonald* (1885), 15 Q. B. D. 323, C. C. R.; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 240, 631.

(*d*) Co. Litt. 2 b; Bac. Abr., tit. Infancy and Age (F.), 7th ed., p. 347.

(*e*) Bac. Abr., tit. Infancy and Age (F.), 7th ed., p. 347.

(*f*) *Ibid.* As to descent of real estate, see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 7 *et seq.*

(*g*) As to distribution of personal estate, see *ibid.*, pp. 16 *et seq.*

(*h*) A gift may be made by will to an infant *en ventre sa mère* (*Burdet* v. *Hopegood* (1718), 1 P. Wms. 486; *Re Salaman*, *De Pass* v. *Sonnenthal*, [1908] 1 Ch. 4, C. A.), or to an unborn child if born within the time permitted by the law against perpetuities (*Mogg* v. *Mogg* (1815), 1 Mer. 654, 664).

(*i*) Bac. Abr., tit. Infancy and Age (F.), 7th ed., p. 347; *O'Shanassy* v. *Joachim* (1876), 1 App. Cas. 82, P. C.; and see title GIFTS, Vol. XV., p. 405, and pp. 76 *et seq.*, *post*. An infant may buy jewellery and plate if he has money to pay for them (*Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, 39, Ex. Ch.). As to the power of an infant to avoid the transaction on attaining full age, see p. 76, *post*.

(*j*) 1 Roll. Abr., tit. Enfants (B.), p. 728; *Keane* v. *Boycott* (1795), 2 Hy. Bl. 512, *per* EYRE, C.J., at p. 515.

(*k*) Co. Litt. 191 a, Butler's note (1), vi. 3.

SECT. I. Acquisition.

behalf of the infant in the same manner as an adult could disclaim (*l*).

Legacy to infant.

The capacity of an infant to take a legacy does not enable him to give a valid receipt for it (*m*), and the executor is not discharged by paying it to the father (*n*) or any person other than his guardian (*o*) on his behalf, unless the will expressly or by implication authorises such payment (*p*). In the absence of such authority the executor can only obtain a complete discharge for the legacy during the infancy of the legatee by paying it into court (*q*).

Acquisition of property by infant voidable.

201. A purchase of property (*r*), or the acceptance of a gift of property, by an infant is voidable by him either by himself during infancy (*a*) or upon attaining full age, or by his successors in title if he dies without having confirmed it (*b*); but in the meantime the property is vested in him (*c*). If he avoids it after attaining full age, the purchase or gift is void *ab initio*, and the property revests in the vendor or donor (*d*).

(*l*) *Croxon* v. *Lever* (1863), 12 W. R. 237; *Bennett* v. *Harfoot* (1871), 19 W. R. 428; *Wolverhampton and Staffordshire Banking Co.* v. *George* (1883), 24 Ch. D. 707.

(*m*) *Philips* v. *Paget* (1740), 2 Atk. 80; *Ledward* v. *Hassells* (1856), 2 K. & J. 370. But where a legacy is directed to be paid to the legatee at an earlier age than twenty-one, the court will authorise the payment (*Re Deneker, Peters* v. *Bancherean*, [1895] W. N. 28). As to an infant domiciled abroad, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 272.

(*n*) *Dagley* v. *Tolferry* (1715), 1 P. Wms. 285; see *Rotheram* v. *Fanshaw* (1748), 3 Atk. 628, *per* Lord HARDWICKE, L.C., at p. 629; *Cooper* v. *Thornton* (1790), 3 Bro. C. C. 96, 186. But a small legacy to an infant has been ordered to be paid to her father to enable both of them to emigrate (*Walsh* v. *Walsh* (1852), 1 Drew. 64). A legacy given to a parent for himself and his child may be paid to the parent (*Cooper* v. *Thornton, supra; Robinson* v. *Tickell* (1803), 8 Ves. 142); and see p. 118, *post*.

(*o*) *Dobbs* v. *Brain*, [1892] 2 Q. B. 207. A good receipt can be given by his guardian for the capital (*M'Creight* v. *M'Creight* (1849), 13 I. Eq. R. 314) or the income of an infant's legacy (*Re Long, Lovegrove* v. *Long*, [1901] W. N. 166). Compare *Re Cresswell* (1882), 30 W. R. 244).

(*p*) *Cooper* v. *Thornton, supra; Robinson* v. *Tickell, supra;* and compare *Re Parton, Parton* v. *Parton* (1911), 131 L. T. Jo. 106. As to the case of a father entitled by the *lex loci domicilii* to receive a legacy, see note (*a*), p. 118, *post;* and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 272.

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42; *Re Salaman, De Pass* v. *Sonnenthal*, [1907] 2 Ch. 46. As to setting aside a fund to answer a legacy to an infant, see *Rimell* v. *Simpson* (1848), 18 L. J. (CH.) 55; *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 226, 233, C. A.; *Re Salaman, De Pass* v. *Sonnenthal, supra;* and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 272; and compare *Elliott* v. *Elliott* (1885), 54 L. J. (CH.) 1142, where in a partition action small sums were paid into the Post Office Savings Bank to the account of an infant.

(*r*) As to copyhold property, see pp. 96, 97, *post;* and as to leasehold property, see pp. 97 *et seq.*, *post*.

(*a*) Co. Litt. 380 a, b; *Newry and Enniskillen Rail. Co.* v. *Coombe* (1849), 3 Exch. 565; and see title GIFTS, Vol. XV., p. 405.

(*b*) Co. Litt. 2 b; 1 Bl. Com. 466; 2 Bl. Com. 291, 292; *North Western Rail. Co.* v. *M'Michael, Birkenhead, Lancashire and Cheshire Junction Rail. Co.* v. *Pilcher* (1850), 5 Exch. 114, 123; *Thurstan* v. *Nottingham Permanent Benefit Building Society*, [1902] 1 Ch. 1, C. A.; affirmed, [1903] A. C. 6.

(*c*) Com. Dig., tit. Enfant (B. 1); *Ketsey's Case* (1613), Cro. Jac. 320; *Thompson* v. *Leach* (1690), 2 Vent. 198, 203.

(*d*) Shep. Touch., 7th ed., 285; Preston, Treatise on Conveyancing, Vol. II. p. 226; *Butler and Baker's Case* (1591), 3 Co. Rep. 25 a; *Thompson* v. *Leach, supra; Mallott* v. *Wilson*, [1903] 2 Ch. 494, 501.

Partition or exchange.

202. If an infant is party to an exchange of lands, and, after coming of age, continues in possession of the land given to him in exchange, he is bound by the transaction (*e*). Similarly, he is bound by a partition, though unfair to himself, if he acquiesces in it after coming of age (*f*).

Property subject to burdens and conditions.

203. An infant takes property subject to all its burdens, such as a mortgage (*g*), a lien (*h*), a lease (*i*), a contract for sale by his predecessor in title (*k*), a fine payable on admission to a copyhold (*l*), or the liability to repair a bridge or highway (*m*); and he is bound by all the conditions attached to the property (*n*), whether precedent (*o*), or subsequent (*p*), except a subsequent condition which is inapplicable to an infant, or cannot be performed by him (*q*).

SUB-SECT. 2.—*By Gift.*

Gifts to infants.

204. Where property is given to an infant, it vests in the infant immediately upon the gift being completed (*r*); and a gift to an infant *inter vivos* cannot afterwards be revoked (*s*). If a gift, either *inter vivos* or by testamentary disposition, is made to an infant for a particular purpose, the gift is effectual, irrespective of the purpose, and notwithstanding its failure (*t*). There is a presumption in

(*e*) Co. Litt. 51 b; Bac. Abr., tit. Infancy and Age (I.), 8; *Cecil* v. *Salisbury* (*Earl*) (1691), 2 Vern. 224, 225.

(*f*) Co. Litt. 171 a, b.

(*g*) *Tracey* v. *Lawrence* (1854), 2 Drew. 403.

(*h*) *Thurstan* v. *Nottingham Permanent Benefit Building Society*, [1902] 1 Ch. 1, C. A.

(*i*) Com. Dig., tit. Enfant (B. 1); *Maddon* d. *Baker* v. *White* (1787), 2 Term Rep. 159; *Kelly* v. *Coote* (1856), 5 I. C. L. R. 469. But he is not liable to pay rent higher than the profits he receives (*Re Fair, a Minor* (1850), 13 I. Eq. R. 278). As to leases to infants, see p. 97, *post*.

(*k*) *Bullock* v. *Bullock* (1820), 1 Jac. & W. 603.

(*l*) *Evelyn* v. *Chichester* (1765), 3 Burr. 1717, 1719.

(*m*) 2 Co. Inst. 703; Bac. Abr., tit. Infancy and Age (G.), 7th ed., p. 349; *R.* v. *Sutton* (1835), 3 Ad. & El. 597, 612.

(*n*) Bac. Abr. tit. Infancy and Age (G.), 7th ed., p. 350. As to copyhold land, see pp. 96, 97, *post*, and as to leasehold property, see pp. 97 *et seq.*, *post*.

(*o*) Co. Litt. 246 b; *Gundry* v. *Baynard* (1705), 2 Vern. 479; *Scot* v. *Haughton* (1706), 2 Vern. 560; *Griffin* v. *Griffin* (1804), 1 Sch. & Lef. 352; *Gardiner* v. *Slater* (1858), 25 Beav. 509; *Re Brown's Will, Re Brown's Settlement* (1881), 18 Ch. D. 61, C. A.; *Bevan* v. *Mahon-Hagan* (1893), 31 L. R. Ir. 342, C. A.

(*p*) Co. Litt. 380 b.; *Cary* v. *Bertie* (1697), 2 Vern. 333, 342, 343; *Hearle* v. *Greenbank* (1749), 1 Ves. Sen. 298, *per* Lord HARDWICKE, L.C., at p. 304. But where the condition is for payment out of the rent, of which he does not get possession till of full age, he is not bound till he gets possession (*Slade* v. *Tompson* (1615), 3 Bulst. 58).

(*q*) Such as a condition of residence (*Parry* v. *Roberts* (1871), 19 W. R. 1000; *Partridge* v. *Partridge*, [1894] 1 Ch. 351) or of forfeiture in case of refusal or neglect to take name or arms (*Re Edwards, Lloyd* v. *Boyes*, [1910] 1 Ch. 541). In the last case the condition was not precedent as in *Bevan* v. *Mahon-Hagan*, *supra*, and an infant was held to be incapable of refusal or neglect.

(*r*) *Hunter* v. *Westbrook* (1827), 2 C. & P. 578; see title GIFTS, Vol. XV., pp. 397 *et seq.*, 418.

(*s*) *Smith* v. *Smith* (1836), 7 C. & P. 401; *Andrew* v. *Andrew* (1874), 22 W. R. 684.

(*t*) *Barlow* v. *Grant* (1684), 1 Vern. 255; *Nevill* v. *Nevill* (1702), 2 Vern. 431; *Barton* v. *Cooke* (1800), 5 Ves. 461, *per* ARDEN, M.R., at p. 463; *Lewes* v. *Lewes* (1848), 16 Sim. 266; *Noel* v. *Jones* (1848), 16 Sim. 309; and see title GIFTS, Vol. XV., p. 426.

SECT. 1. Acquisition.

favour of the validity of a gift by a parent or grandparent to a child (*a*), if it is complete (*b*). The question whether a gift by a father to an infant child is or is not an advancement within the meaning of the Statute of Distribution (*c*), depends on whether it is of a considerable or of a small amount (*d*).

Appointment by parent, when void.

205. An appointment of property to an infant child may be made under a power of appointment to or among children, if it is not precluded by the terms of the power and is made in good faith (*e*). But if it is made for a corrupt purpose, as, for instance, to an infant child in bad health, with a view to the appointor taking the appointed property upon his death as his next of kin, it is void (*f*).

SECT. 2.—*Alienation.*

SUB-SECT. 1.—*In General.*

Alienation by infant voidable.

206. An infant can dispose of property by sale, demise, or gift (*g*), in the same manner as an adult, except where the alienation of the property is clearly prejudicial to his interests (*h*). But except in the case of a valid sale of gavelkind land (*i*), or in the case of alienation of property pursuant to or in performance of a contract which is in law binding upon him (*k*), or in the case of a marriage settlement made under the Infant Settlements Act, 1855 (*l*), he cannot make a finally effectual disposition of property by deed (*m*);

(*a*) *Garrett* v. *Wilkinson* (1848), 2 De G. & Sm. 244, *per* KNIGHT BRUCE, V.-C., at p. 246; *Beanland* v. *Bradley* (1854), 2 Sm. & G. 339, *per* STUART, V.-C., at p. 343.

(*b*) *May* v. *May* (1863), 33 Beav. 81, *per* ROMILLY, M.R., at p. 87; *Jones* v. *Lock* (1865), 1 Ch. App. 25; and see, further, title GIFTS, Vol. XV., pp. 414 *et seq.*

(*c*) 22 & 23 Car. 2, c. 10; see s. 3.

(*d*) *Morris* v. *Burroughs* (1738), 1 Atk. 399, 403; *Elliot* v. *Collier* (1747), 1 Ves. Sen. 15, 16, 17; and see generally, title DESCENT AND DISTRIBUTION, Vol. XI., p. 20.

(*e*) *Henty* v. *Wrey* (1882), 21 Ch. D. 332, C. A.; *Re De Hoghton, De Hoghton* v. *De Hoghton*, [1896] 2 Ch. 385, 396.

(*f*) *Hinchinbroke* (*Lord*) v. *Seymour* (1784), 1 Bro. C. C. 395, referred to as *Lord Sandwich's Case* in *M'Queen* v. *Farquhar* (1805), 11 Ves. 467, 479, and in *Keily* v. *Keily* (1843), 4 Dr. & War. 38, 55; *Wellesley* (*Lady*) v. *Mornington* (*Earl*) (1855), 2 K. & J. 143; and see title POWERS.

(*g*) As to gifts by an infant, see title GIFTS, Vol. XV., pp. 402 *et seq.* As to gifts void for undue influence, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 77 *et seq.* As to unconscionable bargains, see titles EQUITY, Vol. XIII., p. 20; MONEY AND MONEY-LENDING; and compare title CONTRACT, Vol. VII., pp. 358 *et seq.*

(*h*) *Harvey* v. *Ashley* (1748), 3 Atk. 607, *per* Lord HARDWICKE, L.C., at p. 610.

(*i*) See pp. 80, 81, *post.*

(*k*) See pp. 64, 67 *et seq.*, *ante.*

(*l*) 18 & 19 Vict. c. 43; see pp. 103 *et seq.*, *post.*

(*m*) Co. Litt. 171 b; 2 Bl. Com. 291, 292; Bac. Abr., tit. Infancy and Age (I.) 3, 7th ed., pp. 360 *et seq.*; Com. Dig., tit. Enfant (C. 2); *Paget* v. *Paget* (1882), 11 L. R. Ir. 26, C. A., *per* LAW, L.C., at p. 28. An agreement, however, in the marriage settlement of an infant for the settlement of her present and after-acquired property may sever her joint tenancy in property coming within the agreement, the settlement being taken to be for her benefit (*Burnaby* v. *Equitable Reversionary Interest Society* (1885), 28 Ch. D. 416). As to surrenders of copyhold property, see p. 97, *post*; and as to the granting of leases, see pp. 97 *et seq.*, *post.*

since the disposition is voidable by him when he comes of age (*n*), or by his successors in title, if it is not confirmed by him when he attains full age or if he dies before attaining full age (*o*). A deed made by an infant which does not take effect by delivery of his hand, as, for instance, a power of attorney (*p*), or which is not for his benefit (*q*), is void.

Real estate.

207. Apart from statutory authority (*r*), the real estate of an infant cannot be bound by contract, nor settled or alienated by his parent or guardian (*s*) or by the Chancery Division of the High Court (*t*) under its general powers in reference to infants (*u*), even when it is for the benefit of the infant (*x*), unless it is a case of salvage (*a*). The court has, however, assumed to deal with the interests of an infant in personal estate when it would be for his benefit (*b*).

Powers of the High Court.

As to wills of infants, see p. 49, *ante*, and p. 104, *post*. As to church patronage, see p. 101, *post*. As to dispositions for payment of debts, see pp. 81, 82, *post*.

(*n*) Co. Litt. 171 b; Perkins, Profitable Book, ch. i., s. 12; *Zouch* d. *Abbot and Hallet* v. *Parsons* (1762), 3 Burr. 1794, 1801 *et seq.*; —— v. *Handcock* (1810), 17 Ves. 383; *Paget* v. *Paget* (1882), 11 L. R. Ir. 26, C. A., *per* LAW, L.C., at p. 28; *Burnaby* v. *Equitable Reversionary Interest Society* (1885), 28 Ch. D. 416, *per* PEARSON, J., at p. 424. An infant can avoid his disposition during infancy, but until he attains full age such avoidance is as voidable as the disposition itself, and cannot therefore be final (Littleton's Tenures, s. 258; Co. Litt. 171 b, 380 b; Bac. Abr., tit. Infancy and Age (I.) 7, 7th ed., p. 374; *Slator* v. *Trimble* (1861), 14 I. C. L. R. 342). For forms of repudiation and confirmation of a conveyance or lease, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 557, 558. For form of conveyance by tenants in common, one being an infant, and part of the purchase-money being paid to a trustee, see *ibid.*, p. 559. For form of condition of sale where one vendor is an infant, see *ibid.*, Vol. XI., pp. 200, 416.

(*o*) *Whittingham's Case* (1603), 8 Co. Rep. 42 b; Perkins, Profitable Book, ch. i., s. 12; *Zouch* d. *Abbot and Hallet* v. *Parsons*, *supra*; *Lecky* v. *Knox* (1809), 1 Ball & B. 210; —— v. *Handcock*, *supra*; *Allen* v. *Allen* (1842), 2 Dr. & War. 307, 338 *et seq.*; *Burnaby* v. *Equitable Reversionary Interest Society*, *supra*. As to the transfer by an infant of shares in a joint stock company, see also p. 61, *ante*.

(*p*) See p. 48, *ante*.

(*q*) *Ibid.*

(*r*) As to statutory powers of selling and letting an infant's land, see pp. 81 *et seq.*, 94, 95, 100, *post*, and as to settling his property, see pp. 101 *et seq.*, *post*.

(*s*) *Field* v. *Moore*, *Field* v. *Brown* (1855), 7 De G. M. & G. 691, C. A., *per* TURNER, L.J., at p. 709.

(*t*) *Taylor* v. *Philips* (1750), 2 Ves. Sen. 23; *Simson* v. *Jones* (1831), 2 Russ. & M. 365, *per* LEACH, M.R., at pp. 376, 377; *Calvert* v. *Godfrey* (1843), 6 Beav. 97; *Field* v. *Moore*, *Field* v. *Brown*, *supra*, at pp. 709 *et seq.*; *Daly* v. *Daly* (1845), 2 Jo. & Lat. 752, *per* SUGDEN, L.C., at p. 758; *Re Staines*, *Staines* v. *Staines* (1886), 33 Ch. D. 172.

(*u*) See p. 47, *ante*, and pp. 125, 146 *et seq.*, *post*.

(*x*) *Calvert* v. *Godfrey*, *supra*; *Re Staines*, *Staines* v. *Staines*, *supra*, *per* NORTH, J., at p. 173; *Re Swanston* (*an Infant*) (1887), 31 Sol. Jo. 427, C. A.; *Re Hurst*, *Hurst* v. *Hurst* (1891), 29 L. R. Ir. 219; *Re De Teissier's Settled Estates*, *Re De Teissier's Trusts*, *De Teissier* v. *De Teissier*, [1893] 1 Ch. 153.

(*a*) *Re Jackson*, *Jackson* v. *Talbot* (1882), 21 Ch. D. 786; *Re Hurst*, *Hurst* v. *Hurst*, *supra*.

(*b*) *Nunn* v. *Hancock* (1871), 6 Ch. App. 850; *Re Wells*, *Boyer* v. *Maclean*, [1903] 1 Ch. 848 (not following *Peto* v. *Gardner* (1843), 2 Y. & C. Ch. Cas. 312; and *Day* v. *Day* (1845), 9 Jur. 785). Compare the cases as to compromise, p. 145, *post*.

SECT. 2. Alienation.

Election of infant.

208. The doctrine of election (*c*) applies to infants in the same way as to adults (*d*); and election will be made by the court on behalf of the infant if, on inquiry, it is found to be for his benefit (*e*).

Mortgage is void.

209. A mortgage by an infant is, under the Infants Relief Act, 1874 (*f*), absolutely void (*g*).

Alienation by payment on delivery.

210. Payment of money by an infant by his own hand on delivery of a chattel is valid and effectual, whether it is for valuable consideration or by way of gift (*h*). If it is for valuable consideration, it cannot be revoked after any part of the consideration has been enjoyed by the infant (*i*); but if the consideration wholly fails, the infant can recover back any money paid (*k*). An infant can also recover back money or chattels disposed of by way of gift (*l*).

Waiver of rights by *feme covert*.

An infant married woman has not been permitted to waive in favour of her husband her rights in respect of money in court (*m*) or her right to an equity to a settlement (*n*).

SUB-SECT. 2.—*Gavelkind Land.*

Feoffment of gavelkind land by infant of fifteen years.

211. An infant of the age of fifteen years who is seised in fee simple in possession of land of gavelkind tenure (*o*) can on a sale of it for full consideration, but not otherwise (*a*), effectually alienate it by feoffment with livery of seisin made by him in person (*b*).

(*c*) As to the doctrine of election, see title EQUITY, Vol. XIII., pp. 16 *et seq.*

(*d*) *Bennett* v. *Houldsworth* (1877), 6 Ch. D. 671.

(*e*) *Simson* v. *Jones* (1831), 2 Russ. & M. 365, 374. It applies equally in the case of real estate (*Streatfield* v. *Streatfield* (1736), Cas. *temp.* Talb. 176) and personal estate (*Hervey* v. *Desbouverie* (1735), Cas. *temp.* Talb. 130); and see *Brown* v. *Brown* (1866), L. R. 2 Eq. 481.

(*f*) 37 & 38 Vict. c. 62; see *ibid.*, s. 1; and pp. 48, 49, 63, *ante*.

(*g*) *Nottingham Permanent Benefit Building Society* v. *Thurstan*, [1903] A. C. 6.

(*h*) Bac. Abr., tit. Infancy and Age (I.), 7th ed., p. 367; *Manby* v. *Scott* (1663), 1 Mod. Rep. 124, Ex. Ch., *per* HYDE, J., at p. 137; *Buckinghamshire* (*Earl*) v. *Drury* (1761), 2 Eden, 60, H. L., *per* Lord MANSFIELD, at p. 72; *Wilson* v. *Kearse* (1800), Peake, Add. Cas. 196; *Holmes* v. *Blogg* (1818), 8 Taunt. 508, 511; *Re Burrows*, *Ex parte Taylor* (1856), 8 De G. M. & G. 254, C. A. As to gifts by infants, see title GIFTS, Vol. XV., p. 402. As to the effect of a cheque or bill of exchange drawn by an infant, see titles BANKERS AND BANKING, Vol. I., p. 587; BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 490.

(*i*) Bac. Abr., tit. Infancy and Age (I.), 7th ed., p. 367; *Holmes* v. *Blogg*, *supra*; *Corpe* v. *Overton* (1883), 10 Bing. 252, 255 *et seq.*; *North Western Rail. Co.* v. *M'Michael*, *Birkenhead*, *Lancashire and Cheshire Junction Rail. Co.* v. *Pilcher* (1850), 5 Exch. 114, 128; *Re Burrows*, *Ex parte Taylor*, *supra*; *Valentini* v. *Canali* (1889), 24 Q. B. D. 166.

(*k*) *Corpe* v. *Overton*, *supra*; *Everett* v. *Wilkins* (1874), 29 L. T. 846; *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589.

(*l*) See title GIFTS, Vol. XV., p. 402. As to the presumption of undue influence in case of gifts to parents and persons in a fiduciary position, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 107 *et seq.*

(*m*) *Stubbs* v. *Sargon* (1839), 2 Beav. 496; *Abraham* v. *Newcombe* (1842), 12 Sim. 566.

(*n*) *Shipway* v. *Ball* (1881), 16 Ch. D. 376; and see titles EQUITY, Vol. XIII., p. 70; HUSBAND AND WIFE, Vol. XVI., pp. 334 *et seq.*, 341.

(*o*) As to gavelkind land, see Co. Litt. 140 a, 175 b; 1 Bl. Com. 74, 75; 2 Bl. Com. 84, 85, and title REAL PROPERTY AND CHATTELS REAL.

(*a*) *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525.

(*b*) 2 Bl. Com. 84; Bac. Abr., tit. Gavelkind (A.), 7th ed., pp. 49, 50; Robinson,

The feoffment must be evidenced by a charter or writing signed by the infant himself (*c*), and the livery of seisin should be evidenced by a memorandum indorsed on the charter or writing (*d*); and, since the infant cannot give a valid receipt for the purchase-money, this memorandum should contain an attestation of the payment thereof (*e*). But, although the purchaser may safely pay it to the infant, and he can require such payment, its investment in his own name, or in the names of trustees for him, until he attains full age, is a preferable course (*f*).

SUB-SECT. 3.—*Sale for Special Purposes.*

Sale for payment of debts of deceased persons.

212. Where, in an action instituted for the payment of the debts of a deceased person, the land of an infant heir or devisee is decreed to be sold for the purpose of satisfying the debts, the infant may be directed and compelled to convey the land to a purchaser (*g*). If land liable to satisfy the debts has been devised in settlement, and is vested in a person for life, or other limited interest, or is vested, otherwise than by devise, in the heir of the deceased person, subject to an executory devise over in favour of a person not existing or not ascertained, the tenant for life or other limited interest, or the first executory devisee, or heir, as the case may be, may, notwithstanding infancy, be directed to convey the fee simple of or other whole interest in the land to a purchaser (*h*). In either case the conveyance by an infant is as effectual as if he were of full age (*i*).

Customs of Gavelkind, 3rd ed., pp. 248 *et seq.*; *Whittingham's Case* (1603), 8 Co. Rep. 42 b.

(*c*) Statute of Frauds (29 Car. 2, c. 3), s. 1. But it need not be by deed (Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3). For form of charter of feoffment and memorandum of livery of seisin, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 562—564.

(*d*) *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525, at p. 528. See Encyclopædia of Forms and Precedents, Vol. VI., pp. 562 *et seq.*

(*e*) Robinson, Customs of Gavelkind, 3rd ed., p. 277, note (b); *Re Maskell and Goldfinch's Contract, supra*, at p. 528.

(*f*) *Re Maskell and Goldfinch's Contract, supra*, at pp. 528, 529.

(*g*) Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47), s. 11. The enactment extends to the infant heir of a devisee (*Brook* v. *Smith* (1830), 2 Russ. & M. 73). An infant tenant in tail will be directed to convey in the manner prescribed by the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74) (*Radcliffe* v. *Eccles* (1836), 1 Keen, 130; *Penny* v. *Pretor* (1838), 9 Sim. 135). The real estate of persons dying after 1st January, 1898, vests in their personal representatives (Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (1); see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 238), rendering the course indicated in the text unnecessary, except in the case of legal interests in copyholds and customary freeholds, which do not so vest, although equitable interests in such lands do (Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4)). The usual practice was to declare the infant a trustee, and make a vesting order (*Thomas* v. *Gwynne* (1846), 9 Beav. 275; see title TRUSTS AND TRUSTEES).

(*h*) Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47), s. 12; Debts Recovery Act, 1839 (2 & 3 Vict. c. 60), s. 1; Debts Recovery Act, 1848 (11 & 12 Vict. c. 87), s. 1. These Acts extend to copyholds (*Wood* v. *Beetlestone* (1854), 1 K. & J. 213).

(*i*) Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47), s. 11; Debts Recovery Act, 1848 (11 & 12 Vict. c. 87), s. 1; *Heming* v. *Archer* (1845), 8 Beav. 294.

SECT. 2. Alienation.

Instead of a sale a mortgage may be directed for the same purpose (*k*).

Sale or mortgage for repairs.

213. The court has power to sell or mortgage real estate, to which an infant is absolutely entitled, for the purpose of raising money to do necessary repairs to part of the estate, when such repairs are in the nature of salvage (*l*).

Sale in partition action.

214. In an action for the partition of property (*m*), a request for sale in lieu of partition may be made, or an undertaking to purchase the share of another party, who requests the sale, may be given, on behalf of an infant by his next friend or guardian *ad litem* (*n*). But the court is not bound to comply with any such request or undertaking on behalf of an infant, unless it appears that the sale or purchase will be for his benefit (*o*). On the other hand the court may, if it thinks fit, direct a sale of the property on the request of any of the parties interested in it, notwithstanding the infancy of any of the other parties (*p*). For the purpose of effecting the sale, infants who are interested will be declared trustees of their shares (*q*), and persons will be appointed to convey those shares to a purchaser (*r*).

Sale in redemption or foreclosure action.

215. In an action for redemption or foreclosure of a mortgage (*s*), where an infant is interested in the equity of redemption of the mortgaged property, a sale of the property may be ordered if it is clearly for his benefit (*t*).

Sales under Lands Clauses Consolidation Act.

216. In cases where the Lands Clauses Consolidation Act, 1845 (*a*), applies, power is given to guardians as respects the lands of infant wards, and to trustees, executors, and administrators as regards the interests of infant *cestuis que trustent*, to sell and convey the lands or interests of such wards and *cestuis que trustent* to the company or body of persons authorised to purchase the same (*b*),

(*k*) Debts Recovery Act, 1839 (2 & 3 Vict. c. 60), s. 1.

(*l*) *Glover* v. *Barlow* (1831), cited in *Re Jackson*, *Jackson* v. *Talbot* (1882), 21 Ch. D. 786, 788, n.; *Re Jackson*, *Jackson* v. *Talbot*, *supra*, *per* KAY, J., at p. 789, where he said that the jurisdiction should be jealously exercised.

(*m*) See title PARTITION.

(*n*) *Rimington* v. *Hartley* (1880), 14 Ch. D. 630, dissenting from *Platt* v. *Platt* (1880), 28 W. R. 533.

(*o*) Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6. The court will not make the order unless satisfied that the sale will be for the benefit of the infant (*Rimington* v. *Hartley*, *supra*). If an order for sale is made upon the request of an infant, it does not effect a conversion of the infant's property (*Howard* v. *Jalland*, [1891] W. N. 210; *Re Norton*, *Norton* v. *Norton*, [1900] 1 Ch. 101).

(*p*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 3.

(*q*) *Lees* v. *Coulton*, *Lees* v. *Clutton* (1875), L. R. 20 Eq. 20; *Davis* v. *Ingram*, [1897] 1 Ch. 477; and see pp. 83, 84, *post*.

(*r*) *Davis* v. *Ingram*, *supra*; and see pp. 83, 84, *post*.

(*s*) See title MORTGAGE.

(*t*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 25, 71, Sched. II., repealing and re-enacting stat. (1852) 15 & 16 Vict. c. 86, s. 48; *Mears* v. *Best* (1853), 10 Hare, Appendix II., p. li.; *Siffken* v. *Davis* (1853), Kay, Appendix, p. xxi.; *Wigham* v. *Measor* (1857), 5 W. R. 394.

(*a*) 8 & 9 Vict. c. 18.

(*b*) *Ibid.*, s. 7. See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 57, 58.

and to enfranchise their copyhold lands, and exercise their powers as lords of a manor, and to release lands from any rent, charge, or incumbrance in which they are interested, and to agree for the apportionment of any such rent, charge, or incumbrance (*c*).

Acquisition of the lands of infants for special purposes.

Provision has been made for the acquisition of the lands of infants as sites for churches or other places of religious worship, and churchyards (*d*), cemeteries (*e*), burial grounds (*f*), workhouses (*g*), and schools (*h*), and, to the extent of not above one acre, as a site for an institution for the promotion of science, literature, fine art, the diffusion of useful knowledge, and the foundation of libraries, museums, and galleries, and for similar purposes (*i*), or for the purposes of the defence of the country (*k*), and by the Commissioners of Woods and Forests on behalf of the Crown (*l*). Special provisions have also been made for the sale, exchange, or lease of settled land (*m*) for the purpose of the erection thereon of dwellings for the working classes (*n*), or for the purpose of small holdings (*o*).

SUB-SECT. 4.—*Property held by Infant as Trustee or Mortgagee.*

Vesting orders. Infant trustee of land.

217. Where a trustee entitled to or possessed of land, or entitled to a contingent interest therein, either solely or jointly with any other person, is an infant, the Chancery Division of the High Court, and, in cases within their respective jurisdictions, a palatine or county court, may make an order vesting the land in any person, in any manner and for any estate, or releasing or disposing of the contingent right to any person (*p*). In any such case, if it is convenient, the court may appoint a person to convey the land or release the contingent right (*q*).

Infant trustee of stock.

Where a trustee entitled to stock (*r*) or a chose in action, either solely or jointly with another person, is an infant, the court may

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 8.

(*d*) See titles BURIAL AND CREMATION, Vol. III., pp. 442 *et seq.*; ECCLESIASTICAL LAW, Vol. XI., pp. 723 *et seq.*

(*e*) See title BURIAL AND CREMATION, Vol. III., pp. 507, 508, 515.

(*f*) See *ibid.*, pp. 460, 461.

(*g*) Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), s. 1.

(*h*) See title EDUCATION, Vol. XII., pp. 118 *et seq.*

(*i*) See title LITERARY AND SCIENTIFIC INSTITUTIONS.

(*k*) Defence Act, 1842 (5 & 6 Vict. c. 94), ss. 10, 18; Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117), s. 4; Defence Act, 1860 (23 & 24 Vict. c. 112), s. 11.

(*l*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), ss. 53 *et seq.*

(*m*) As to the land of an infant being deemed settled land, see p. 94, *post.*

(*n*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74, which is substituted for the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 11, referred to and extended by the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 18; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*o*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 40 (1), (4), (5); and see title SMALL HOLDINGS AND SMALL DWELLINGS.

(*p*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 46.

(*q*) *Ibid.*, s. 33. See title TRUSTS AND TRUSTEES.

(*r*) Including fully paid-up shares and any fund, annuity or security transferable in books kept by any company or society or by instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50).

SECT. 2. Alienation.

make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends or income thereof, or to sue for or recover the chose in action, in any other person (*s*).

Infant mortgagee.

Where a person possessed of or entitled to land, or a contingent right in land, as a security for money is an infant, the court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee (*t*).

SECT. 3.—*Conversion.*

Conversion of real and personal property.

218. Real property may be purchased for an infant out of a fund in which he is interested, which is capital money under the Settled Land Acts, 1882 to 1890 (*u*), or is otherwise impressed in equity with the character of realty (*a*), where the purchase is authorised by these Acts, or by the instrument under which the infant is interested in the money (*b*); and real property in which an infant is interested may be sold and converted into money under the authority of the Settled Land Acts, 1882 to 1890 (*c*), or of the instrument under which the infant derives title (*d*).

No conversion as a rule apart from statute.

Apart from these Acts a court of equity will not, as a rule, allow an infant's realty to be converted into personalty, or personalty into realty (*e*), and will not order the sale of an infant's realty even where it would be for his benefit (*f*). Accordingly, money in which an infant is interested, if it does not partake of the character of realty, cannot lawfully be invested in real property (*g*); and if real property in which an infant is interested is lawfully sold, the money arising from the sale will be impressed in equity with the character of realty (*h*).

(*s*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 35 (1). See title TRUSTS AND TRUSTEES.

(*t*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 28. See title MORTGAGE.

(*u*) (1882) 45 & 46 Vict. c. 38; (1884) 47 & 48 Vict. c. 18; (1887) 50 & 51 Vict. c. 30; (1889) 52 & 53 Vict. c. 36; (1890) 53 & 54 Vict. c. 69; and see title SETTLEMENTS.

(*a*) *Fletcher* v. *Ashburner* (1779), 1 Bro. C. C., Appendix, 497, 499. As to the doctrine of conversion, see title EQUITY, Vol. XIII., pp. 104 *et seq.*

(*b*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21; *Fletcher* v. *Ashburner*, *supra*, at p. 499.

(*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 3, 4, 59, 60. For the purpose of devolution it retains its character of realty (*ibid.*, s. 22 (5)).

(*d*) *Fletcher* v. *Ashburner*, *supra*, at p. 499. Where trustees, who have power to sell an infant's real property, do not all agree to do so, the court will not order the sale even though it would add to the income of the estate (*Camden* (*Marquis*) v. *Murray* (1880), 16 Ch. D. 161).

(*e*) *Rook* v. *Worth* (1750), 1 Ves. Sen. 460, *per* Lord HARDWICKE, L.C., at p. 461.

(*f*) *Calvert* v. *Godfrey* (1843), 6 Beav. 97; *Re De Teissier's Settled Estates*, *Re De Teissier's Trusts*, *De Teissier* v. *De Teissier*, [1893] 1 Ch. 153, but see *Inwood* v. *Twyne* (1762), 2 Eden, 148, *per* Lord HENLEY, L.C., at pp. 152, 153; *Ex parte Grimstone* (1772), Amb. 706, 708; *Robinson* v. *Robinson* (1854), 19 Beav. 494.

(*g*) *Gibson* v. *Scudamore* (1726), 1 Dick. 45; *Rook* v. *Worth*, *supra*, *per* Lord HARDWICKE, L.C., at p. 461; *Ex parte Bromfield* (1792), 3 Bro. C. C. 510, 516; *Ware* v. *Polhill* (1805), 11 Ves. 257, *per* Lord ELDON, L.C., at p. 278. In a suitable case, however, the infant's money has been authorised to be laid out in the purchase of land (*Ashburton* (*Lord*) v. *Ashburton* (*Lady*) (1801), 6 Ves. 6), and, by way of salvage, in the improvement of his real property (*Re Household*, *Household* v. *Household* (1884), 27 Ch. D. 553; *Conway* v. *Fenton* (1888), 40 Ch. D. 512).

(*h*) *Rook* v. *Worth*, *supra*; *Ware* v. *Polhill*, *supra*, at p. 278. Compare the

Where, however, real property is directed by the court to be sold for the purpose of paying costs, the balance of the proceeds after payment of the costs is personalty, and descends as personalty (*i*). An infant who is interested in property cannot elect to convert its character from personalty into realty or from realty into personalty (*k*).

SECT. 4.—*Management and Application for Benefit of Infant.*

SUB-SECT. 1.—*In General.*

Management of property and application for benefit of infant.

219. The powers of managing property in which an infant is interested, and of applying the income and, in some cases, the capital thereof for his benefit, vary according to circumstances. Where the infant is interested in the property under a settlement or will, any trusts or powers for providing maintenance or education for, or otherwise benefiting, him, lawfully created by the settlement or will, are exercisable in respect of the property (*l*). A power to apply income for the maintenance and support of an infant authorises its application for his education (*m*), and may be exercised during his father's lifetime in spite of the father's legal duty to maintain the infant (*n*), if the terms of the power so direct (*o*) or authorise (*p*). If the power is discretionary, the father or mother cannot require it to be exercised (*q*); and the father cannot obtain under it recoupment of sums paid by him for maintenance of the infant in the past (*r*). The trustees must exercise their discretion for the benefit of the infant, and are not to be deterred from

Indirect benefit to parent.

statutory results in *Foster* v. *Foster* (1875), 1 Ch. D. 588 (sale in partition action), and *Kelland* v. *Fulford* (1877), 6 Ch. D. 491 (sale under Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18)).

(*i*) *Seeley* v. *Jago* (1717), 1 P. Wms. 389; *Carr* v. *Ellison* (1786), 2 Bro. C. C. 56; *Van* v. *Barnett* (1812), 19 Ves. 102, *per* Lord ELDON, L.C., at p. 111. Compare *Howard* v. *Jalland*, [1891] W. N. 210, and *Re Norton, Norton* v. *Norton*, [1900] 1 Ch. 101 (sales in partition actions at request of infant plaintiffs); and see title EQUITY, Vol. XIII., pp. 112, 114.

(*k*) *Burgess* v. *Booth*, [1908] 2 Ch. 648, C. A., following the general principle recognised in *Steed* v. *Preece* (1874), L. R. 18 Eq. 192; and see title EQUITY, Vol. XIII., p. 111.

(*l*) *Hall* v. *Carter* (1742), 2 Atk. 354; *Lyddon* v. *Lyddon* (1808), 14 Ves. 558; *Prater* v. *Prater* (1827), 6 L. J. (o. s.) (CH.) 90; *Meacher* v. *Young* (1834), 2 My. & K. 490; *Stocken* v. *Stocken* (1838), 4 My. & Cr. 95; *Ellis* v. *Maxwell* (1841), 3 Beav. 587; *Brophy* v. *Bellamy* (1873), 8 Ch. App. 798; *Re Alford, Hunt* v. *Parry* (1886), 32 Ch. D. 383; *Dean* v. *Dean*, [1891] 3 Ch. 150; *King-Harman* v. *Cayley*, [1899] 1 I. R. 39. An account will not be ordered as to the mode in which the trust or power has been exercised (*Hora* v. *Hora* (1863), 33 Beav. 88).

(*m*) *Re Breeds' Will* (1875), 1 Ch. D. 226, *per* JESSEL, M.R., at p. 229.

(*n*) See pp. 114, 115, *post*.

(*o*) *Mundy* v. *Howe (Earl)* (1793), 4 Bro. C. C. 224; *Meacher* v. *Young, supra, Stocken* v. *Stocken, supra; Kekewich* v. *Langston* (1840), 11 Sim. 291; *White* v. *Grane* (1854), 18 Beav. 571; *Birch* v. *Sumner* (1857), 3 Jur. (N. S.) 712; *Newton* v. *Curzon* (1867), 16 L. T. 696.

(*p*) *Berkeley* v. *Swinburne* (1834), 6 Sim. 613; *Hawkins* v. *Watts* (1834), 7 Sim. 199; *Stephens* v. *Lawry* (1842), 2 Y. & C. Ch. Cas. 87; *Brophy* v. *Bellamy, supra; Malcolmson* v. *Malcolmson* (1885), 17 L. R. Ir. 69, C. A.

(*q*) *Thompson* v. *Griffin* (1841), Cr. & Ph. 317; *Re Lofthouse, an Infant* (1885), 29 Ch. D. 921, C. A.; *Re Bryant, Bryant* v. *Hickley*, [1894] 1 Ch. 324.

(*r*) *Re Kerrison's Trusts* (1871), L. R. 12 Eq. 422; *Wilson* v. *Turner* (1883), 22 Ch. D. 521, C. A., overruling *Ransome* v. *Burgess* (1866), L. R. 3 Eq. 773.

SECT. 4. Management and Application for Benefit of Infant.

doing what is for his benefit, because it is also a benefit to the father (*s*).

A trust or gift for the maintenance and education of an infant, or for his use and benefit, if not expressly confined to his minority, may extend to a longer period (*t*), and may confer on him a life interest (*a*). Where a father by settlement or will provides for the maintenance of his infant children, the provision is assumed to be intended to continue until they attain full age (*b*), and not to cease, in the case of a daughter, on her marriage under age (*c*). But it is otherwise where the mother is directed to maintain the children till they come of age, and a son marries and leaves the maternal roof (*d*).

Trust may extend beyond minority.

Where land is vested in an infant absolutely, his guardian has in law certain powers in respect of it (*e*); and certain powers have been created by statute in respect of land to which an infant, not being a married woman, is beneficially entitled in possession (*f*).

Powers of guardians.

Where stock, or money produced by the redemption of stock, is standing in the name of an infant who is beneficially entitled thereto, the Chancery Division of the High Court, on the application of the guardian of the infant, or, if there is no guardian, on an application in any cause pending in the court, may order all or any part of the income of the stock or money to be paid to the guardian, or any other person, for the maintenance and education, or otherwise for the benefit of the infant (*g*).

Income of stock.

Where property is held by trustees in trust for an infant, powers, in certain circumstances, of applying the income for his maintenance, education, or benefit, have been conferred by statute (*h*); and where these are not applicable, the Chancery Division of the High Court can, in some cases, by virtue of its inherent jurisdiction (*i*), direct the income to be applied towards the maintenance of the infant.

Powers of trustees and court.

(*s*) *Re Lofthouse, an Infant* (1885), 29 Ch. D. 921, C. A., *per* COTTON, L.J., at p. 932.

(*t*) *Ellis* v. *Maxwell* (1841), 3 Beav. 587, 594, 595; *Longmore* v. *Elcum* (1843), 2 Y. & C. Ch. Cas. 363; *Carr* v. *Living* (No. 2) (1864), 33 Beav. 474; *Scott* v. *Key* (1865), 35 Beav. 291; *Re Booth, Booth* v. *Booth*, [1894] 2 Ch. 282; compare *Re Breeds' Will* (1875), 1 Ch. D. 226.

(*a*) *Alexander* v. *M'Cullcok* (1787), 1 Cox, Eq. Cas. 391; *Soames* v. *Martin* (1839), 10 Sim. 287; *Lewis* v. *Lewes* (1848), 16 Sim. 266; *Yates* v. *Maddan* (1851), 3 Mac. & G. 532; *Wilkins* v. *Jodrell* (1879), 13 Ch. D. 564; *Williams* v. *Papworth*, [1900] A. C. 563, 567, P. C.

(*b*) *Chambers* v. *Goldwin* (1805), 11 Ves. 1; *Martin* v. *Martin* (1866), L. R. 1 Eq. 369, *per* PAGE WOOD, V.-C., at p. 371; dissenting from *Kime* v. *Welfitt* (1830), 3 Sim. 533.

(*c*) *Chambers* v. *Goldwin, supra*; *Conolly* v. *Farrell* (1845), 8 Beav. 347.

(*d*) *Staniland* v. *Staniland* (1865), 34 Beav. 536.

(*e*) See pp. 131 *et seq.*, *post*.

(*f*) See pp. 87 *et seq.*, *post*.

(*g*) Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 32; *Re Pongerard* (1847), 1 De G. & Sm. 426; *Re Westwood* (1865), 6 New Rep. 316. The income will be ordered to be paid to the father of the infant on his petition (*Re Murphy, a Minor* (1839), 2 I. Eq. R. 24; *Re Naish* (1840), 9 L. J. (CH.) 252; *Re Ramon, Ramon* v. *Ramon* (1878), 27 W. R. 260).

(*h*) See pp. 88, 89, *post*.

(*i*) See pp. 89 *et seq.*, *post*. As to the nature and extent of equitable jurisdiction, see title EQUITY, Vol. XIII., pp. 4 *et seq.*

SUB-SECT. 2.—*Statutory Powers of Management and Maintenance.*

SECT. 4. Management and Application for Benefit of Infant.

220. Where an infant, other than a married woman, is beneficially entitled to the possession of land, whether under a settlement or will, or by descent (*j*), certain powers of management and maintenance in reference to the land are conferred by statute (*k*) on the trustees appointed for the purpose by the settlement (*l*), if any, or, if there are none, then on the persons, if any, who are for the time being under the settlement trustees with power of sale of the land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale (*m*); or, if there are none, then on any persons whom, on the application of a guardian or next friend of the infant, the court having jurisdiction in the matter (*n*) appoints as trustees for the purpose (*o*). The trustees may enter into possession of and carry on or superintend the general management of the land, with full powers as to the timber and buildings thereon, including insurance against fire (*p*), as to the working of mines and quarries usually worked, as to the drainage and improvement of the land, and as to making allowances to and arrangements with tenants and others, determining tenancies, and accepting surrenders of leases and tenancies (*q*). Out of the income of the land, including the produce of the sale of timber and underwood, the trustees must keep down any annual sum and the interest of any principal sum charged on the land, and may pay the expenses of management and other outgoings (*r*).

Management of land.

By whom powers exercisable.

Extent of powers.

(*j*) *Re Glover*, [1899] 1 I. R. 337; *Re Cowley*, [1901] 1 Ch. 38; *Re Bradshaw*, [1904] 1 I. R. 18.

(*k*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42.

(*l*) This does not include trustees appointed for the purposes of the Settled Land Acts (*Re Helyar*, *Helyar* v. *Beckett*, [1902] 1 Ch. 391).

(*m*) Trustees appointed for the purposes of the Settled Land Acts are not such trustees (*ibid.*).

(*n*) The jurisdiction is vested in the Chancery Division of the High Court of Justice, and, in the case of land in the County Palatine of Lancaster, in the Court of Chancery of the County Palatine (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 69).

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42; see *Tuthill* v. *Tuthill*, [1902] 1 I. R. 429. If the infant's interest is in an undivided share of land, the powers may be exercised jointly with the persons entitled to or having powers over the other undivided share or shares (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42 (6)). The Act does not override the expression of a contrary intention in the instrument under which the infant is entitled, and takes effect subject to its terms and provisions (*ibid.*, s. 42 (7)), and does not apply where the instrument came into operation before 1st January, 1882 (*ibid.*, s. 42 (8)). Where these powers are not conferred, or are not exercised, the rights of entry into possession and management of the land rest with the infant's guardian (see pp. 131, 132, *post*).

(*p*) A remainderman can insist on any policy moneys recovered being expended in rebuilding under the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 83; see title INSURANCE, p. 542, *post*; and an infant tenant for life is not entitled to a charge for the sum so expended (*Re Quicke's Trusts*, *Poltimore* v. *Quicke*, [1908] 1 Ch. 887).

(*q*) Conveyancing and Law of Property Act, 1882 (44 & 45 Vict. c. 41), s. 42 (1), (2). Where the infant is impeachable for waste, the trustees are not to commit waste, and are to cut timber on the terms and under the restrictions to which the infant would have been subject if of full age (*ibid.*, s. 42 (2)).

(*r*) *Ibid.*, s. 42 (3).

SECT. 4. Management and Application for Benefit of Infant.

Application of income.

The trustees at their discretion (*s*) may further apply any income which they think proper, according to the infant's age, for his maintenance, education, or benefit, or may pay it to his parent or guardian to be applied for that purpose (*t*).

The residue of the income is to be invested and accumulated in securities authorised by the settlement, if any, or by law for the investment of trust money, and the trustees have power to vary investments (*u*).

Powers of maintenance.

221. Subject to the provisions of the instrument under which the interest of the infant arises, and so far as a contrary intention is not expressed in it (*a*), trustees (*b*) have by statute (*c*) certain powers of maintenance where property is held by them in trust for an infant, either for life or for any greater interest, and whether absolutely, or contingently on his attaining full age, or on the occurrence of any event before his attaining full age (*d*). These powers do not arise

(*s*) This discretion extends to giving past maintenance out of accrued income (*Re Pitts' Settlement, Collins* v. *Pitts*, [1884] W. N. 225). Where trustees have not exercised their discretion, or have exercised it under a mistake, past maintenance may be allowed (*Maberly* v. *Turton* (1808), 14 Ves. 499; *Stopford* v. *Canterbury* (*Lord*) (1840), 11 Sim. 82, 99; *Re Wells, Wells* v. *Wells* (1889), 43 Ch. D. 281).

(*t*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42 (4).

(*u*) *Ibid.*, s. 42 (5). All or any of the accumulations may be applied as income of the current year (*ibid.*). Subject to any such application the accumulated fund will belong to the infant absolutely in case of attaining full age. If, being a female, she marries, it will belong to her for her separate use, and her receipt after marriage will, even before she attains full age, be a good discharge for it. In case of the infant dying under full age, and, being a female, without having been married, then, if the infant was, under a settlement, tenant for life or by purchase tenant in any entail, the fund is to be held on the trusts, if any, declared of the fund by the settlement; but, if no such trusts are declared, or the infant was entitled to the land by descent and not by purchase, or was tenant thereof in fee simple, absolute or determinable, the fund is to be held in trust for the infant's personal representatives as part of his or her personal estate (*ibid.*). As to the administrative duties of trustees generally, see titles SETTLEMENTS; TRUSTS AND TRUTSEES.

(*a*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43; *Re Moody, Woodroffe* v. *Moody*, [1895] 1 Ch. 101. A direction to accumulate the income is not an expression of a contrary intention (*Re Thatcher's Trusts* (1884), 26 Ch. D. 426). A gift of residue which would include the income may be a sufficient contrary intention (*Re Dickson, Hill* v. *Grant* (1885), 29 Ch. D. 331, C. A., *per* FRY, L.J., at p. 339); and a gift of an immediate life interest will prevent accumulations of income becoming the property of remaindermen by virtue of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43 (2) (*Re Humphreys, Humphreys* v. *Levett*, [1893] 3 Ch. 1, C. A.). For form of direction in a will that the statute is to apply as if the testator stood *in loco parentis* to the infants, see Encyclopædia of Forms and Precedents, Vol. XV., p. 517.

(*b*) Including an executor where a testator has made a bequest to an infant absolutely (*Re Smith, Henderson-Roe* v. *Hitchins* (1889), 42 Ch. D. 302), and an administrator with the will annexed (*Re Adams, Verrier* v. *Haskins*, [1906] W. N. 220); and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 273.

(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43.

(*d*) *Re Medlock, Ruffle* v. *Medlock* (1886), 55 L. J. (CH.) 738; *Re Burton's Will, Banks* v. *Heaven*, [1892] 2 Ch. 38; *Re Adams, Adams* v. *Adams*, [1893] 1 Ch. 329; *Re Clements, Clements* v. *Pearsall*, [1894] 1 Ch. 665; *Re Woodin, Woodin* v. *Glass*, [1895] 2 Ch. 309, C. A.; *Re Jeffery, Arnold* v. *Burt*, [1895] 2 Ch. 577.

where the interest of the infant depends on an event which may not occur until after he has attained full age (*e*); nor where the infant on attaining full age becomes entitled to the capital of the property only, and not to the interest accrued during his minority (*f*); but they do arise when the infant has a life interest determinable on bankruptcy or attempted alienation (*g*).

Application of income.

Where the powers arise, the trustees may at their discretion pay to the parent or guardian, if any, of the infant, or otherwise apply for or towards his maintenance, education, or benefit, all or any part of the income of the property, whether or not there is any other fund applicable to that purpose, or any person bound by law to provide for his maintenance or education (*h*). The residue of the income is to be invested and accumulated in securities sanctioned by the settlement, if any, or authorised by law for the investment of trust money; and the accumulations are to be held for the benefit of the person who ultimately becomes entitled to the property from which they arise (*i*). But the trustees may at any time, if they think fit, apply all or any of the accumulations as if they were income arising in the then current year (*j*).

Application of deposit in post office savings bank.

222. Deposits in the post office savings bank in the name of an infant under seven years of age may be paid out for his maintenance, education, or benefit, where the Postmaster-General is satisfied that they are urgently needed and will be applied for that purpose (*k*).

SUB-SECT. 3.—*Orders of Court as to Maintenance.*

Powers of court as to maintenance out of income.

223. The Chancery Division of the High Court has jurisdiction with respect to the income of property belonging to or held in trust for an infant, to take care of it and apply it for his maintenance or otherwise for his benefit, and accumulate any surplus not required to be so applied (*l*). But where the property is vested in trustees,

(*e*) *Re Judkin's Trusts* (1884), 25 Ch. D. 743, 749; *Re Abrahams, Abrahams* v. *Bendon*, [1911] 1 Ch. 108.

(*f*) *Re Dickson, Hill* v. *Grant* (1885), 29 Ch. D. 331, C. A.; *Re Holford, Holford* v. *Holford*, [1894] 3 Ch. 30, C. A., *per* KAY, L.J., at p. 52, overruling *Re Jeffery, Burt* v. *Arnold*, [1891] 1 Ch. 671.

(*g*) *Re Long, Lovegrove* v. *Long*, [1901] W. N. 166.

(*h*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43 (1), (3).

(*i*) *Ibid.*, s. 43 (1); *Re Buckley's Trusts* (1883), 22 Ch. D. 583; *Re Wells, Wells* v. *Wells* (1889), 43 Ch. D. 281; *Re Humphreys, Humphreys* v. *Levett*, [1893] 3 Ch. 1, C. A.; *Re Bowlby, Bowlby* v. *Bowlby*, [1904] 2 Ch. 685, C. A., *per* ROMER, L.J., at p. 710; overruling *Re Scott, Scott* v. *Scott*, [1902] 1 Ch. 918.

(*j*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43 (5). It has been held that past accumulations may be applied towards past maintenance (*Re Pitts' Settlement, Collins* v. *Pitts*, [1884] W. N. 225).

(*k*) Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 1; Post Office Savings Bank Regulations, 1900, reg. 27 (3) (Statutory Rules and Orders Revised, Vol. XI., Savings Bank, p. 64).

(*l*) *Wellesley* v. *Wellesley* (1828), 2 Bli. (N. S.) 124, H. L., *per* Lord REDESDALE, at pp. 133, 134; *Coster* v. *Coster* (1836), 1 Keen, 199; *Re Allan, Havelock* v. *Havelock* (1881), 17 Ch. D. 807; *Re Smeed* (1886), 2 T. L. R. 535. As to the income of stock, or money produced by the redemption of stock, standing in the name of the infant, see p. 86, *ante*. As to orders of court generally, see title JUDGMENTS AND ORDERS. When the property does not exceed £500 the

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upon whom a power has been expressly conferred of applying at their discretion all or any part of the income for the maintenance, education, or benefit of the infant (*m*), the court will not override or interfere with that discretion, if the trustees actually exercise it (*n*), and are not manifestly doing so in a manner prejudicial to the infant's interests (*o*). If there are two funds producing income available for maintenance, and there has been no exercise of discretion on the subject by trustees who are invested with the discretion, the court will order maintenance from the income of the fund from which it is most for the benefit of the infant that he should receive it (*p*).

Maintenance out of income directed to be accumulated.

Maintenance will be ordered out of income directed to be accumulated, where there appears to be a paramount intention that the infant shall be suitably maintained (*q*).

Application of capital for maintenance.

In exceptional cases (*r*), where the income is insufficient, the court has directed maintenance for an infant or some other outlay for his benefit to be provided out of the *corpus* of his personal property (*s*), and even, where necessary, by a charge on his real property (*a*). But the *corpus* of real property will not be charged

county court has jurisdiction (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67 (6)). As to money recovered by an infant in the county court, see title COUNTY COURTS, Vol. VIII., p. 497.

(*m*) See p. 85, *ante*.

(*n*) *Wilson* v. *Turner* (1883), 22 Ch. D. 521, C. A.; *Re Wells, Wells* v. *Wells* (1889), 43 Ch. D. 281, *per* NORTH, J., at pp. 286, 287.

(*o*) *Brophy* v. *Bellamy* (1873), 8 Ch. App. 798; *Re Hodges, Davey* v. *Ward* (1878), 7 Ch. D. 754; *Re Lofthouse, an Infant* (1885), 29 Ch. D. 921, C. A.; *Re Bryant, Bryant* v. *Hickley*, [1894] 1 Ch. 324.

(*p*) *Foljambe* v. *Willoughby* (1824), 2 Sim. & St. 165; *Lucas* v. *King* (1863), 11 W. R. 818; *Martin* v. *Martin* (1866), L. R. 1 Eq. 369; *Re Wells, Wells* v. *Wells, supra, per* NORTH, J., at pp. 286, 287. It will be ordered out of the income of a fund in which the infant has a defeasible or limited interest rather than out of property to which he is absolutely entitled (*Ravenhill* v. *Dansey* (1723), 2 P. Wms. 179; *Bruin* v. *Knott* (1845), 1 Ph. 572; *Lygon* v. *Coventry* (*Lord*) (1845), 14 Sim. 41; *Methold* v. *Turner* (1851), 4 De G. & Sm. 249; *Fuzley* v. *Hyder* (1872), 41 L. J. (CH.) 583); except where the income of one fund is expressly directed to be only applied for his maintenance so far as actually necessary (*Rawlins* v. *Goldfrap* (1800), 5 Ves. 440). Compare *Gisborne* v. *Gisborne* (1877), 2 App. Cas. 300, where the trustees had an "uncontrollable discretion."

(*q*) *Re Allan, Havelock* v. *Havelock* (1881), 17 Ch. D. 807; *Re Collins, Collins* v. *Collins* (1886), 32 Ch. D. 229; *Re Alford, Hunt* v. *Parry* (1886), 32 Ch. D. 383; *Re Walker, Walker* v. *Duncombe*, [1901] 1 Ch. 879; and see *Re Colgan* (*Infants*) (1881), 19 Ch. D. 305.

(*r*) *Walker* v. *Wetherell* (1801), 6 Ves. 473. A trustee has no power to break in upon the capital unless expressly authorised to do so by the terms of the trust (*ibid.*, at p. 474).

(*s*) *Barlow* v. *Grant* (1684), 1 Vern. 255; *Harvey* v. *Harvey* (1722), 2 P. Wms. 21; *Ex parte Green* (1820), 1 Jac. & W. 253 (where the property was very small); *Re Swift, Ex parte Swift* (1828), 1 Russ. & M. 575; *Re Chambers, Ex parte Chambers* (1829), 1 Russ. & M. 577; *Fentiman* v. *Fentiman* (1842), 13 Sim. 171; *Bridge* v. *Brown* (1843), 2 Y. & C. Ch. Cas. 181; *Farrance* v. *Viley* (1852), 21 L. J. (CH.) 313 (where the property was under £20); *Re Lane* (1853), 17 Jur. 219; *Re Clarke* (1853), 17 Jur. 362; *Re Welch* (1854), 23 L. J. (CH.) 344.

(*a*) *Ex parte Whitehead* (1828), 2 Y. & J. 243; *Fentiman* v. *Fentiman, supra; Re Corkers, Minors* (1846), 3 Jo. & Lat. 377; *Re Allen* (1850), cited in *Re Howarth* (1873), 8 Ch. App. 415, 417, n. (5); *Nottley* v. *Palmer, Nottley* v. *Nottley* (1865), 11 Jur. (N. S.) 968; *Re Howarth, supra*. But the charge will not, in his

where the infant has only an estate in tail or some other limited interest (*b*).

Where infant has only a reversionary or contingent interest.

Where necessary, maintenance may be ordered out of capital or income in which the infant has only a reversionary or a contingent interest (*c*). But if the interest be taken under a will, the testator's creditors will be safeguarded (*d*); and where recourse is had to income or *corpus* to which the infant is not absolutely entitled in possession, its recoupment, in the interest of parties who are prejudiced by the transaction, will be secured by a policy of assurance on the life of the infant (*e*), or by a charge on any interest in remainder which he may have in the property (*f*).

Maintenance during father's lifetime.

224. The court will not relieve the father of his legal duty to maintain his infant children (*g*) by directing maintenance out of their property (*h*), unless he is not in a position to maintain them in a manner suitable to their expectant fortunes (*i*).

Amount of maintenance.

Where maintenance is allowed, the amount will depend upon the age, position, and fortune of the infant (*k*). The court will

absence, bind the person on whom the estate will descend as heir, if the infant dies before attaining full age (*Re Howarth* (1873), 8 Ch. App. 415, 418). *Re Howarth, supra*, was apparently decided on the ground that a judgment might be obtained against the infant for necessaries supplied to him by which his inheritance would be bound (*ibid., per* JAMES, L.J., at p. 418). It went to the very verge of the law, and perhaps beyond it (*Cadman* v. *Cadman* (1886), 33 Ch. D. 397, C. A., *per* LINDLEY and LOPES, L.JJ., at p. 401). See also *Ex parte M'Key* (1810), 1 Ball & B. 405.

(*b*) *Re Hamilton* (*Infants*) (1885), 31 Ch. D. 291, C. A.; *Cadman* v. *Cadman*, *supra*; *Re Hambrough's Estate, Hambrough* v. *Hambrough*, [1909] 2 Ch. 620.

(*c*) *Kilminster* v. *Noel* (1834), 4 L. J. (CH.) 52; *Re Haye, Ex parte Haye* (1849), 3 De G. & Sm. 485; *De Witte* v. *Palin* (1872), L. R. 14 Eq. 251; even where such income is directed to be accumulated (*Re Colgan* (*Infants*) (1881), 19 Ch. D. 305).

(*d*) *Revel* v. *Watkinson* (1748), 1 Ves. Sen. 93, *per* Lord HARDWICKE, L.C., at p. 95.

(*e*) *Re Arbuckle* (1866), 14 W. R. 535; *Re Robinson* (*Rosa*), *an Infant* (1868), 16 W. R. 1106; *De Witte* v. *Palin*, *supra*; *Re Bruce, an Infant* (1882), 30 W. R. 922; *Re Tanner* (1884), 53 L. J. (CH.) 1108, *per* KAY, J., at p. 1110. The order in *Re Arbuckle*, *supra*, is set out in 2 Seton, Judgments and Orders, 6th ed., pp. 1002 *et seq.*

(*f*) *Fentiman* v. *Fentiman* (1842), 13 Sim. 171; *Re Colgan* (*Infants*), *supra*; *Re Tanner*, *supra*, *per* KAY, J., at p. 1110.

(*g*) See pp. 114, 115, *post.*

(*h*) *Jackson* v. *Jackson* (1737), 1 Atk. 513, 515; *Butler* v. *Butler* (1743), 3 Atk. 58, 60; *Darley* v. *Darley* (1746), 3 Atk. 399; *Andrews* v. *Partington* (1790), 2 Cox, Eq. Cas. 223. There is no similar obligation on the mother during the father's lifetime (*Haley* v. *Bannister* (1819), 4 Madd. 275; *Hodgens* v. *Hodgens* (1837), 4 Cl. & Fin. 323, H. L.); or after his death (*Douglas* v. *Andrews* (1849), 12 Beav. 310).

(*i*) *Buckworth* v. *Buckworth* (1784), 1 Cox, Eq. Cas. 80; *Haley* v. *Bannister*, *supra*; *Re Williams, Ex parte Williams* (1846), 2 Coll. 740. If the infant's fortune is large, a liberal view will be taken of the father's position (*Jervoise* v. *Silk* (1813), Coop. G. 52; *Re Williams, Ex parte Williams*, *supra*; *Re Allan, Havelock* v. *Havelock* (1881), 17 Ch. D. 807).

(*k*) *Ex parte Petre* (1802), 7 Ves. 403; *Kay* v. *Johnston* (1856), 21 Beav. 536, *per* ROMILLY, M.R., at pp. 537, 538; *Griggs* v. *Gibson*, *Maynard* v. *Gibson* (No. 2), *Ex parte Maynard* (1866), 14 W. R. 538; *Re Allan, Havelock* v. *Havelock*, *supra*; *Re Collins, Collins* v. *Collins* (1886), 32 Ch. D. 229; *Barnes* v. *Ross*, [1896] A. C. 625; *Re Walker, Walker* v. *Duncombe*, [1901] 1 Ch. 879. The amount may

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take into consideration the pecuniary position of the infant's father (*l*), or mother (*m*), and also the interests of his brothers or sisters, who are otherwise insufficiently provided for, and may benefit by the allowance (*n*). The court may allow a larger sum than is actually required for his maintenance (*o*), and, if his interests so require, a further amount will be directed, notwithstanding that maintenance has been expressly provided for him under a settlement or will (*p*).

Allowance for past maintenance.

On the same principles as regulate directions for future maintenance, the court will direct the recoupment of sums advanced for the past maintenance of the infant by his father (*q*), or mother (*r*), or other relatives (*s*), or by executors or trustees (*t*), or a stranger (*u*), except where the advances must be regarded as having been made by way of gift (*a*).

SUB-SECT. 4.—*Advancement out of Capital.*

Advancement out of capital by trustee or the court.

225. An advancement for placing the infant out in life, or otherwise for a special benefit to him, as distinct from ordinary maintenance and education (*b*), may be made by a trustee in suitable cases out of the capital of the personal estate in which the infant has a vested or presumptive or contingent interest, where it is authorised by the terms of the trust (*c*), and by the Chancery

be increased as the infant grows older (*Nunn* v. *Harvey* (1848), 2 De G. & Sm. 301).

(*l*) *Hill* v. *Chapman* (1787), 2 Bro. C. C. 231; *Jervoise* v. *Silk* (1813), Coop. G. 52; *Re Allan, Havelock* v. *Havelock* (1881), 17 Ch. D. 807. But a direct benefit will not be given to the father out of an infant's property (*Re Stables* (1852), 21 L. J. (CH.) 620).

(*m*) *Roach* v. *Garvan* (1748), 1 Ves. Sen. 157, *per* Lord HARDWICKE, L.C., at p. 160; *Heysham* v. *Heysham* (1785), 1 Cox, Eq. Cas. 179; *Barnes* v. *Ross*, [1896] A. C. 625.

(*n*) *Lanoy* v. *Athol* (*Duke and Duchess*) (1742), 2 Atk. 444, *per* Lord HARDWICKE, L.C., at p. 447; *Tweddell* v. *Tweddell* (1822), Turn. & R. 1, *per* Lord ELDON, L.C., at p. 13; *Wellesley* v. *Beaufort* (*Duke*) (1827), 2 Russ. 1, *per* Lord ELDON, L.C., at p. 28; *Re Weld* (*a Person of Unsound Mind*) (1882), 20 Ch. D. 451, C. A., *per* JESSEL, M.R., at p. 457; *Re Walker, Walker* v. *Duncombe*, [1901] 1 Ch. 879. The interests of an illegitimate brother of the infant have even been considered (*Bradshaw* v. *Bradshaw* (1820), 1 Jac. & W. 647).

(*o*) *Brown* v. *Smith* (1878), 10 Ch. D. 377, 381, C. A.; *Re Lofthouse, an Infant* (1885), 29 Ch. D. 921, 932, C. A.

(*p*) *Aynsworth* v. *Pratchett* (1807), 13 Ves. 321; *Re Walker, Walker* v. *Duncombe, supra.*

(*q*) *Reeves* v. *Brymer* (1801), 6 Ves. 425; *Sherwood* v. *Smith* (1801), 6 Ves. 454; *Ex parte Darlington* (1809), 1 Ball & B. 240; *Parsons* v. *Peters* (1865), 11 Jur. (N. S.) 150; *Re Hodges, Davey* v. *Ward* (1878), 7 Ch. D. 754.

(*r*) *Coster* v. *Coster* (1836), 1 Keen, 199; *Bruin* v. *Knott* (1843), 12 Sim. 436, 456; *Brown* v. *Smith, supra.*

(*s*) The amount has been recouped to a brother (*Boycot* v. *Cotton* (1738), 1 Atk. 552, 556, 557), and to a brother-in-law (*Re Welch* (1854), 23 L. J. (CH.) 344).

(*t*) *Sisson* v. *Shaw* (1804), 9 Ves. 285; *Collis* v. *Blackburn* (1804), 9 Ves. 470; *Maberly* v. *Turton* (1808), 14 Ves. 499.

(*u*) *Marlow* v. *Pitfield* (1719), 1 P. Wms. 558.

(*a*) *Re Cottrell's Estate, Joyce* v. *Cottrell* (1871), L. R. 12 Eq. 566.

(*b*) *Walker* v. *Wetherell* (1801), 6 Ves. 473, 474; *Simpson* v. *Brown* (1865), 13 W. R. 312.

(*c*) *Re Aldridge, Abram* v. *Aldridge* (1886), 55 L. T. 554, C. A.

Division of the High Court out of capital in which the infant has an absolute interest (*d*), or, with the consent of the other persons interested, out of capital in which he has less than an absolute interest (*e*). The court, however, has no power to charge the real estate of an infant for the purpose of his advancement (*f*). The mere conferring of "a power of advancement" upon trustees, without specifying the property out of which the advancement is to be made, does not authorise it to be made out of capital to which the infant would otherwise have no right (*g*). Extent of power.

The word "advancement" is properly appropriate to an early period of life (*h*); but a power of advancement is often so worded as to include any other benefit, and its operation is sometimes expressly extended beyond infancy (*i*). Such extension must, however, be expressly authorised (*j*). If a trustee without express authority makes an advance, for a proper purpose, out of capital to which the infant is absolutely entitled, the advancement will be sanctioned (*k*). If the infant was only entitled to the capital contingently on his attaining full age, the advancement will be allowed if the infant attains full age (*l*); but if he dies during minority, the trustee will be liable to account for the advance to the person who thereupon becomes entitled to the property (*m*).

226. The advancement must not be merely to put money into the infant's pocket (*n*), but must be for a definite purpose for the infant's benefit (*o*). Purpose of advancement.

The advancement must be replaced, if it is not applied to the intended purpose through the default or negligence of the trustee Failure of purpose.

(*d*) *Walker* v. *Wetherell* (1801), 6 Ves. 473, 474, *per* GRANT, M.R., at p. 474; *Curtis* v. *Curtis*, [1901] I. R. 374.

(*e*) *Evans* v. *Massey* (1826), 1 Y. & J. 196. In *Franklin* v. *Green* (1690), 2 Vern. 137 (as explained in Lewin on Trusts, 11th ed., pp. 718, 719, n. (a)), the advancement of an infant who died before attaining full age was sanctioned as against his brothers and sisters who took his share in the capital by survivorship.

(*f*) *Re De Teissier's Settled Estates*, *Re De Teissier's Trusts*, *De Teissier* v. *De Teissier*, [1893] 1 Ch. 153.

(*g*) *Re Aldridge*, *Abram* v. *Aldridge* (1886), 55 L. T. 554, C. A.

(*h*) *Re Kershaw's Trusts* (1868), L. R. 6 Eq. 322, *per* MALINS, V.-C., at p. 323.

(*i*) *Ibid.*; *Lowther* v. *Bentinck* (1874), L. R. 19 Eq. 166; *Re Breeds' Will* (1875), 1 Ch. D. 226.

(*j*) *Clarke* v. *Hogg* (1871), 19 W. R. 617.

(*k*) *Worthington* v. *M'Craer* (1856), 23 Beav. 81, *per* ROMILLY, M.R., at p. 85. But the advance will not be sanctioned where the infant's father is the trustee (*Darley* v. *Darley* (1746), 3 Atk. 399).

(*l*) *Worthington* v. *M'Craer*, *supra*.

(*m*) *Ibid.*, at pp. 85, 86.

(*n*) *Roper-Curzon* v. *Roper-Curzon* (1871), L. R. 11 Eq. 452, *per* Lord ROMILLY, M.R., at p. 453.

(*o*) It has been allowed for purchasing a commission in the army (*Cope* v. *Wilmot* (1771), cited in *Thompson* v. *Thompson* (1844), 1 Coll. 381, 396, n. (a); *Evans* v. *Massey* (1826), 1 Y. & J. 196; *Lawrie* v. *Bankes* (1858), 4 K. & J. 142); putting out as apprentice (*Swinnock* v. *Crisp* (1681), Freem. (CH.) 78; *Franklin* v. *Green*, *supra*; *Simpson* v. *Brown* (1865), 13 W. R. 312; *Curtis* v. *Curtis*, *supra*); emigrating (*Re England* (1830), 1 Russ. & M. 499; *Re Salter's Trusts* (1866), 17 I. Ch. R. 176); purchasing an outfit (*Re Welch* (1854), 23 L. J. (CH.) 344); furnishing a house (*Perry* v. *Perry* (1870), 18 W. R. 482); providing on marriage a settled fund to yield income (*Roper-Curzon* v. *Roper-Curzon*, *supra*).

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making it (*p*); but not if, immediately after its having been so applied, the purpose fails owing to circumstances over which he has no control (*q*).

SECT. 5.—*Settled Land.*

SUB-SECT. 1.—*Statutory Settlement where Infant absolutely Entitled.*

Infants' land deemed settled land.

227. Land to which an infant is entitled in possession (*r*) in his own right is for the purposes of the Settled Land Acts, 1882 to 1890 (*s*), settled land (*t*), and is subject to all the provisions of these Acts with reference to settled land (*a*); the infant being deemed tenant for life thereof (*b*).

SUB-SECT. 2.—*Dealings with Settled Land.*

Exercise of powers of tenant for life in case of infancy.

228. In the case of an infant's land which is thus settled land (*c*), and also where a tenant for life, or a person having the powers of a tenant for life under the Settled Land Acts, 1882 to 1890 (*d*), is an infant, or where an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life (*e*), the powers of a tenant for life under these Acts (*f*) may be exercised on behalf of the infant by the trustees of the settlement, or, if there are none, by such persons and in such manner as the court on the application of a testamentary or other guardian or next friend of the infant either generally, or in a particular case, orders (*g*).

(*p*) *Simpson* v. *Brown* (1865), 13 W. R. 312.

(*q*) *Lawrie* v. *Bankes* (1858), 4 K. & J. 142, where the commission purchased with the advancement was sold a few months afterwards.

(*r*) Including an infant having a vested estate liable to be divested in case of death before attaining full age (*Re James' Settled Estates* (1884), 32 W. R. 898), and the infant heir of one partner in a partnership owning land (*Re Wells* (1883), 31 W. R. 764), but not an infant having only a contingent interest (*Re Horne's Settled Estate* (1888), 39 Ch. D. 84, C. A., *per* NORTH, J., at p. 89).

(*s*) (1882) 45 & 46 Vict. c. 38; (1884) 47 & 48 Vict. c. 18; (1887) 50 & 51 Vict. c. 30; (1889) 52 & 53 Vict. c. 36; (1890) 53 & 54 Vict. c. 69.

(*t*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 59.

(*a*) *Ibid.* See title SETTLEMENTS.

(*b*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 59. Except where the infant has only a contingent interest in the land (*Re Liddell, Liddell* v. *Liddell* (1882), 52 L. J. (CH.) 207; *Re Horne's Settled Estate, supra; Re Sparrow's Settled Estate*, [1892] 1 Ch. 412), and except also, perhaps, where the infant is a married woman (see note (*h*), p. 95, *post*). The application of the powers and provisions of the Settled Land Acts, 1882 to 1890 (see note (*s*), *supra*), to the lands of infants has practically superseded the provision of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 41, that land to which an infant is entitled in his own right for an estate in fee simple, or for any leasehold interest at a rent, is to be deemed a settled estate within the Settled Estates Act, 1877 (40 & 41 Vict. c. 18); and see title SETTLEMENTS.

(*c*) See note (*t*), *supra*.

(*d*) See note (*s*), *supra*.

(*e*) See Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58.

(*f*) *Ibid.*, ss. 3—20, 25—31; Settled Land Act, 1890 (53 & 54 Vict. c. 69), ss. 5—12; and title SETTLEMENTS.

(*g*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60. The persons appointed by the court to act as trustees may be empowered to sell the infant's land out of court, if a sale appears to be for the benefit of the infant (*Re Price, Leighton* v. *Price* (1884), 27 Ch. D. 552). For form of conditional contract for sale of land of infant absolutely entitled, where there are no trustees of the

But it is doubtful whether these powers are exercisable where the infant is a married woman (*h*).

Powers of trustees as against testamentary guardian.

The trustees of the settlement, for the purposes of the Settled Land Acts, 1882 to 1890 (*i*), are not constituted trustees with power of sale of the settled land within the meaning of the Conveyancing and Law of Property Act, 1881, s. 42 (*k*), so as to entitle them to enter into possession of the land during a minority and hold it as against the testamentary guardian of the infant (*l*); but they can exercise their powers without the consent of the testamentary guardian (*m*).

Exercise of powers by persons authorised by the court.

Where in the absence of trustees of the settlement persons are authorised by an order of court to exercise the powers of a tenant for life on behalf of an infant during his minority in relation to the sale of land, and to carry out a certain sale (*n*), it is not necessary to appoint trustees of the settlement for the purpose of receiving notices of the sale (*o*); but the order in such a case ought to direct that the purchase-money be paid into court (*p*).

SECT. 6.—*Registered Land.*

Power of guardian to act for infant.

229. Where a person who, if not under disability, might have made an application, given a consent, done an act, or been party to a proceeding, in relation to any land or charge under the Land Transfer Acts, 1875 and 1897 (*q*), is an infant, his guardian may act on his behalf in the same manner as he himself, if free from disability, might have done in those respects, and may otherwise represent him for the purposes of these Acts (*r*). Where an infant has no guardian, the court may appoint a guardian to act on his behalf for such purposes, and may from time to time change the guardian (*s*).

Infant trustees and mortgagees.

The provisions of the Trustee Act, 1893 (*t*), with respect to infant trustees and mortgagees and the making of vesting orders, apply to registered land and charges (*a*).

Infant tenant for life.

The option which is given to a tenant for life of deciding whether settled land shall be registered in his name, or, where there are trustees with power of sale, in the names of those trustees, or,

settlement, see Encyclopædia of Forms and Precedents, Vol. XII., p. 200; and for form of conveyance by trustee, see *ibid.*, pp. 526, 718.

(*h*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 61 (1).

(*i*) See note (*s*), p. 94, *ante*.

(*k*) 44 & 45 Vict. c. 41; see pp. 87, 88, *ante*.

(*l*) *Re Helyar, Helyar* v. *Beckett*, [1902] 1 Ch. 391.

(*m*) *Re Newcastle's (Duke) Estates* (1883), 24 Ch. D. 129, 142.

(*n*) See note (*g*), p. 94, *ante*.

(*o*) Under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45.

(*p*) *Re Dudley's (Countess) Contract* (1887), 35 Ch. D. 338.

(*q*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*r*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 88. As to registered land generally, see title REAL PROPERTY AND CHATTELS REAL.

(*s*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 88.

(*t*) 56 & 57 Vict. c. 53.

(*a*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 85. The Trustee Act, 1893 (56 & 57 Vict. c. 53), is now substituted for the Acts referred to in the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 85 (see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (1)); and see title TRUSTS AND TRUSTEES.

SECT. 6. Registered Land.

where there is an overriding power of appointment of the fee simple, in the names of the persons in whom that power is vested (*b*), is exercisable in the case of an infant tenant for life by his guardian (*c*).

Infant interested in doubtful question of law or fact.

230. Where a doubtful question, either of law or fact, arising upon the examination of the title to land in which an infant is interested, is referred by the registrar for the opinion of the High Court of Justice (*d*), any other person interested in the land may apply to the court, as defined by the Land Transfer Act, 1875 (*e*), for a direction that the opinion of the court to whom the case is referred shall be binding upon the infant (*f*). The court to whom the application is made may, if necessary, appoint a guardian to appear on behalf of the infant; and, if it is satisfied that the interests of the infant will be sufficiently represented in any case, it makes an order declaring that the infant shall be conclusively bound; and he is thereupon conclusively bound by any decision of the court having cognisance of the case (*g*).

SECT. 7.—*Copyholds.*

Capacity of infant to be a copyholder.

231. An infant may take a copyhold estate by grant (*h*), and may become entitled thereto by descent or by surrender to the use of a will or otherwise (*i*); and, in the absence of a special custom to the contrary, the lord is bound to admit an infant, who is entitled to become tenant of a copyhold tenement (*k*), on due claim by his guardian in socage, that is, his next of kin to whom the tenement cannot descend (*l*).

Admittance of infant.

Where an infant is entitled by descent, or by surrender to the the use of a will, or otherwise, to be admitted tenant of copyhold land, he, in his own person or by his guardian (*m*) or attorney (*n*),

(*b*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 6.
(*c*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 88.
(*d*) *Ibid.*, s. 74.
(*e*) 38 & 39 Vict. c. 87. *I.e.*, the senior judge of the Chancery Division of the High Court of Justice (or in his absence, or at his request, any other judge of that division, and during vacation, the vacation judge or the county court), as the case may be (*ibid.*, s. 114; Land Transfer Rules, 1903, r. 299 (Statutory Rules and Orders Revised, Vol. VII., Land (Registration), England, p. 82)).
(*f*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 76.
(*g*) *Ibid.*, s. 77.
(*h*) Coke, Complete Copyholder, s. 35; Watkins, Treatise on Copyholds, 7th ed., Vol. II., p. 79. As to an infant's capacity to act as steward of a manor, see p. 56, *ante*. As to copyholds generally, see title COPYHOLDS, Vol. VIII., pp. 1 *et seq.*
(*i*) Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 3.
(*k*) Watkins, Treatise on Copyholds, 7th ed., Vol. I., p. 272; Vol. II., p. 101.
(*l*) *Ibid.*; 2 Roll. Abr. 40, tit. Gardein (P.) 1; *R.* v. *Wilby* (*Inhabitants*) (1814), 2 M. & S. 504.
(*m*) As to the appointment and duties of the guardian of an infant copyholder, see title COPYHOLDS, Vol. VIII., pp. 80, 81.
(*n*) An infant who has no guardian may, by writing under his hand and seal, appoint one or more attorneys on his behalf to appear and take an admittance to copyhold land (Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 4). For form of appointment, see Encyclopædia of Forms and Precedents, Vol. VI., p. 558; and for form of admittance of an infant by next friend, see *ibid.*, Vol. V., p. 215.

as the case may require, is to appear at one of the three next courts kept, after the usual notice, for the manor of which the land is parcel, and there offer himself to be admitted (*o*). In default of appearance of the infant in person or by his guardian or attorney, and of acceptance of the admittance, the lord or his steward, after the three courts have been held and proclamations regularly made, may at a subsequent court appoint an attorney to take the admittance of the infant (*p*).

Fine on admittance.

If the fine on the admittance of an infant (*q*) is not paid within three months after a written demand has been left with his guardian, or with the infant himself, if he has no guardian, the lord of the manor may enter upon and hold the land for the purpose of recovering the amount of the fine, with incidental costs, out of the rents and profits (*r*); and a guardian, who pays to the lord the fine and the amount of those incidental costs, may enter upon and hold the land for the purpose of re-imbursing himself the sum so paid by him (*s*).

Forfeiture.

232. An infant is not liable to forfeit his copyhold land for neglecting or refusing to come to a court, or to be admitted to the land, or to pay a fine imposed upon his admittance thereto (*t*), or for any other cause (*a*); except, after reaching the age of discretion, for contempt, as by refusing to pay the accustomed rent, or committing voluntary waste, after frequent warning from the lord (*b*).

Surrender by infant copyholder.

233. The surrender of copyhold land by an infant has been recognised as valid by special custom (*c*). But where there is no such special custom, it is voidable by him on attaining full age, or by his successor in title, if he dies before attaining full age, or without confirming it (*d*).

SECT. 8.—*Leaseholds and Leases.*

SUB-SECT. 1.—*Acquisition and Tenure by Infant.*

(i.) *In General.*

Lease to infant.

234. A lease to an infant, or the assignment of a lease to an infant, is voidable by him when he comes of age (*e*), and he cannot

(*o*) Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 3.
(*p*) *Ibid.*, s. 5.
(*q*) *Ibid.*, ss. 5, 6, 10.
(*r*) *Ibid.*, ss. 6, 7.
(*s*) *Ibid.*, s. 8.
(*t*) *Ibid.*, s. 9. But the lord may seize the land *quousque* (*Dimes* v. *Grand Junction Canal Co.* (1846), 9 Q. B. 469; *Dimes* v. *Grand Junction Canal* (*Proprietors*) (1852), 3 H. L. Cas. 794); and see title COPYHOLDS, Vol. VIII., p. 49.
(*a*) Coke, Complete Copy-Holder, s. 59.
(*b*) *Ibid.*
(*c*) At the age of twelve years (*Lyde* v. *Somister* (1639), Toth. 109); and even at the age of four or five years (*Nayler* v. *Strode* (1686), 2 Rep. Ch. 178, [392]).
(*d*) Watkins, Treatise on Copyholds, 1st ed., Vol. I., pp. 62, 63; see title COPYHOLDS, Vol. VIII., p. 96.
(*e*) Bac. Abr., tit. Infancy and Age (I.) 8, 7th ed., p. 376; *Ketsey's Case*

SECT. 8. Leaseholds and Leases.

be sued on the covenants contained in the lease, either during infancy, or after attaining full age, for rent falling into arrear during his infancy (*f*), nor for a sum in respect of his use and occupation of the demised premises (*g*), unless it can be shown that they were necessary for a person in his station of life (*h*). But apparently the lessor can distrain against him for rent in arrear (*i*).

Surrender of lease.

A surrender of a lease by an infant is void if a new lease in consideration of which it is made is for any reason void (*j*).

(ii.) *Renewable Lease.*

Renewal of lease by or on behalf of infant leaseholder.

235. Where an infant is entitled to a renewable lease, he or his guardian or some other person appointed in his place may be empowered by an order of the High Court of Justice, or either of the Chancery Courts of Lancaster or Durham (*k*), where those courts respectively have jurisdiction, to surrender the lease, and take for the benefit of the infant one or more new similar leases of the premises comprised in the surrendered lease (*l*). The fine or premium paid on the renewal, and the incidental expenses, must be paid out of the infant's estate or will be a charge on the premises (*m*).

Renewal in name of trustee.

236. The principle of equity that a trustee, or guardian, or any one otherwise in a fiduciary position, who takes a renewal in his own name of a lease in which the person to whom he stands in a fiduciary position is interested as lessee, holds the new lease in trust for that person (*n*), is enforced with special strictness when that person is an infant (*o*); even though the lessor refuses to

(1613), Cro. Jac. 320; *Mahon* v. *O'Farrell* (1847), 10 I. L. R. 527; *Blake* v. *Concannon* (1870), 4 I. R. C. L. 323. The lessor can avoid the lease if the infant has obtained it on the pretence of being of age (*Lemprière* v. *Lange* (1879), 12 Ch. D. 675).

(*f*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62).

(*g*) *Lowe* v. *Griffith* (1835), 1 Scott, 458; *Lemprière* v. *Lange*, *supra*.

(*h*) *Crisp* v. *Churchill* (1794), cited in *Lloyd* v. *Johnson* (1798), 1 Bos. & P. 340; *Lowe* v. *Griffith*, *supra*.

(*i*) In *Conny's Case* (1611), 9 Co. Rep. 84 b, it was laid down that an infant who held a tenement of a manor subject to a quit rent could be distrained upon for the rent in arrear during his minority.

(*j*) *Lloyde* v. *Gregory* (1638), W. Jo. 405. An infant cannot surrender a lease; yet if he takes a new lease for a greater interest, it is good until avoided by him. But if he takes a new lease for the same term and no more, it is void, because it is without increase of term or decrease of rent (*Grange* v. *Tiving* (1665), O. Bridg. 107, *per* BRIDGMAN, C.J., at p. 117). As to surrender of leases generally, see title LANDLORD AND TENANT.

(*k*) As to these courts, see title COURTS, Vol. IX., pp. 120, 124.

(*l*) Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), ss. 12, 15, 31, 35, 36. The court has jurisdiction where the legal estate is vested in trustees (*Re Griffiths* (*an Infant*) (1885), 29 Ch. D. 248). As to the power of trustees to renew such leases, see title TRUSTS AND TRUSTEES.

(*m*) Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 14.

(*n*) *Keech* v. *Sandford* (1726), 2 Eq. Cas. Abr. 741; S. C., 2 White & Tud. L. C., 7th ed., p. 693; see titles EQUITY, Vol. XIII., p. 155; TRUSTS AND TRUSTEES.

(*o*) *Walley* v. *Walley* (1687), 1 Vern. 484; *Blewett* v. *Millett* (1774), 7 Bro. Parl. Cas. 367; *Killick* v. *Flexney* (1792), 4 Bro. C. C. 161; *Griffin* v. *Griffin* (1804), 1 Sch. & Lef. 352, 354; *Mulvany* v. *Dillon* (1810), 1 Ball & B. 409.

renew the lease to the infant himself (*p*), and although the person taking the renewal is himself jointly interested in the lease (*q*). Where a lease is renewed to a person who is jointly interested in the lease with an infant, but does not stand in a fiduciary position to him, he holds the new lease for his own benefit to the exclusion of the infant (*r*); except that a tenant for life, who takes a renewal of a lease in his own name, is deemed to renew it for the benefit of himself during his life and of the remaindermen after his death (*a*).

Renewal in name of independent person jointly interested with infant.

SUB-SECT. 2.—*Leases of Infant's Property.*

(i.) *By the Infant.*

237. A lease of an infant's property made by himself without judicial authority is void if it is necessarily to his prejudice (*b*), and in other cases is insecure, since it is voidable by him after attaining full age, or by his successor in title (*c*). But he cannot avoid it during his minority (*d*), and he is bound by it if he continues to accept rent in respect of it after attaining full age (*e*), or if he, after attaining full age, or his successor in title, recognises the validity of the lease (*f*). The lease cannot be repudiated by the lessee (*g*).

Leases of infant's property by infant.

(ii.) *By the Guardian or Trustees.*

238. The power of a guardian to make leases of his ward's property is part of his general powers as guardian (*h*).

Power of guardian to lease.

239. Where an infant is tenant for life, or has or would, if of full age, have the powers of a tenant for life under the Settled Land

Leases by trustees.

(*p*) *Keech* v. *Sandford* (1726), 2 Eq. Cas. Abr. 741; *Ex parte Bennett* (1805), 10 Ves. 380, *per* Lord ELDON, L.C., at p. 386.

(*q*) *Ex parte Grace* (1799), 1 Bos. & P. 376.

(*r*) *Re Biss, Biss* v. *Biss*, [1903] 2 Ch. 40, C. A.

(*a*) *Taster* v. *Marriott* (1768), Amb. 668; *Rawe* v. *Chichester* (1773), Amb. 715; *Pickering* v. *Vowles* (1783), 1 Bro. C. C. 197; *James* v. *Dean* (1805), 11 Ves. 383.

(*b*) *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794, 1807, 1808. If an infant grants a lease reserving no rent, it will be void (*Lane* v. *Cowper* (1575), Moore (K. B.), 103, 105; *Blunden* v. *Baugh* (1633), Cro. Car. 302, 303), unless it is beneficial to him in some other way (*Rames* v. *Machin* (1608), Noy, 130; *Slator* v. *Brady* (1863), 14 I. C. L. R. 61, 64, 65), or, at any rate, it will be voidable by him even during his minority (*Slator* v. *Trimble* (1861), 14 I. C. L. R. 342, *per* HAYES, J., at p. 357). But the rent need not be the best obtainable (*Slator* v. *Trimble, supra*, at p. 356; *Slator* v. *Brady, supra*, at p. 65). As to the distinction between void and voidable contracts of an infant, see p. 63, *ante*.

(*c*) Co. Litt. 308 a; Bac. Abr., tit. Infancy and Age (I.) 7, 7th ed., p. 375; *Rames* v. *Machin, supra*; *Blunden* v. *Baugh, supra*; *Zouch* d. *Abbot and Hallet* v. *Parsons, supra*, at pp. 1804 *et seq.* There must be some overt act of avoidance (*Slator* v. *Brady, supra*, at p. 66).

(*d*) *Slator* v. *Trimble, supra, per* HAYES, J., at p. 356; *Slator* v. *Brady, supra*, at p. 66.

(*e*) *Ashfield* v. *Ashfield* (1626), Godb. 364; *Smith* v. *Low* (1739), 1 Atk. 489; *Baylis* v. *Dineley* (1815), 3 M. & S. 477, *per* Lord ELLENBOROUGH, C. J., at p. 480.

(*f*) *Story* v. *Johnson* (1837), 2 Y. & C. (EX.) 586, *per* Lord ABINGER, C.B., at p. 607. For form of repudiation or confirmation of a lease, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 557, 558.

(*g*) *Davies* v. *Manington* (1658), 2 Sid. 109; *Zouch* d. *Abbot and Hallet* v. *Parsons, supra*, at pp. 1805, 1806; and see *Smith* v. *Bowin* (1669), 1 Mod. Rep. 25.

(*h*) See p. 132, *post*. As to leases generally, see title LANDLORD AND TENANT.

SECT. 8. Leaseholds and Leases.

Acts, 1882 to 1890 (*i*), in respect of settled land, or is absolutely entitled to land in his own right (*j*), the powers of leasing conferred by these Acts on a tenant for life (*k*) may be exercised in respect of the land on behalf of the infant by the trustees of the settlement, and if there are none, by such persons and in such manner as the competent court (*l*), on the application of a guardian or next friend of the infant, either generally or in a particular instance orders (*m*).

(iii.) *Under Direction of the Court.*

Leases of infant's land under direction of the court.

240. Where an infant is entitled to land in fee or in tail, or to leasehold land for an absolute interest, and it appears to the court to be for his benefit, he or his guardian in his name may be empowered by the court to grant building, repairing, mining, improving, agricultural and other leases of the land for such terms of years and subject to such rents and covenants as the court directs, but no fine nor premium must be taken, and the best obtainable rent must be reserved (*n*). The leases are settled by the court, and counterparts, executed by the lessees, must be deposited in the master's office until the infant attains full age (*o*).

Leases under the Settled Estates Act, 1877.

241. Where a person entitled in his own right to land for an estate in fee simple, or to leasehold land at a rent, is an infant, the provisions of the Settled Estates Act, 1877 (*p*), as to leasing (*q*) apply to the land as if it were a settled estate (*r*).

Renewal of leases by infant lessor.

242. Where an infant might, if of full age, be compelled under a subsisting covenant or agreement to renew a lease, he or his guardian in his name may be directed by the court to accept a surrender of the lease and execute a new similar lease (*s*). If the infant is not within the jurisdiction, such person as the court thinks proper may be directed by the court to accept the surrender and

(*i*) (1882) 45 & 46 Vict. c. 38; (1884) 47 & 48 Vict. c. 18; (1887) 50 & 51 Vict. c. 30; (1889) 52 & 53 Vict. c. 36; (1890) 53 & 54 Vict. c. 69.

(*j*) See p. 94, *ante;* and see title SETTLEMENTS.

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 6—17, 20; Settled Land Act, 1889 (52 & 53 Vict. c. 36), s. 2; Settled Land Act, 1890 (53 & 54 Vict. c. 69), ss. 7, 8; and see title SETTLEMENTS.

(*l*) The Chancery Division of the High Court, and also, as regards land in the County Palatine of Lancaster, the Court of Chancery of the County Palatine (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 46 (1), (8)).

(*m*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 58—60; *Cecil* v. *Langdon* (1886), 54 L. T. 418. For form of lease, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 643, 645.

(*n*) Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 17. No lease of the capital mansion-house and the park and grounds held therewith is to be made for a period exceeding the minority of the infant (*ibid.*). The court has jurisdiction where the land is limited in fee defeasible on the happening of certain events (*Re Clark* (1866), 1 Ch. App. 292), and where the infant's estate is in remainder after a life estate (*Re Letchford* (1876), 2 Ch. D. 719), and where the legal estate is vested in trustees (*Re Griffiths* (*an Infant*) (1885), 29 Ch. D. 248). See, also, Seton, Judgments and Orders, 6th ed., pp. 1029 *et seq.*

(*o*) Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 17.

(*p*) 40 & 41 Vict. c. 18.

(*q*) *Ibid.*, ss. 4—15; see titles LANDLORD AND TENANT; SETTLEMENTS.

(*r*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 41.

(*s*) Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), ss. 16, 20, 31.

execute the new lease (*t*). The fines, premiums, and moneys received on account of the renewal of the lease are to be paid to the guardian, and applied under the direction of the court for the benefit of the infant; or, if the infant is out of the jurisdiction, they are to be paid to such account and applied in such manner as the court directs (*a*).

SECT. 9.—*Advowsons.*

Presentation to benefice.

243. An infant, however young he may be, can hold the advowson or patronage of a benefice, and can present to the benefice on an avoidance thereof (*b*). His hand may be guided by his guardian to sign the presentation (*c*). But the guardian is supposed to find a fit person for the infant to present (*d*). Where an advowson is vested in trustees upon trust to present such clerk as a designated person, who happens to be an infant, shall nominate, they are compellable in equity to present the infant's nominee (*e*). The fact of the patron being an infant will not extend the period of six months within which a presentation must be made in order to avoid a lapse to the bishop (*f*). Where during the minority of a patron the right of presentation is expressly vested in trustees, the power to consent to the sale of glebe lands of the benefice vested in the patron by a private Act of Parliament will nevertheless be exercisable during the minority by the guardians of the infant, and not by the trustees (*g*).

Other rights as patron.

SECT. 10.—*Settlements and Covenants to settle on Marriage.*

SUB-SECT. 1.—*At Common Law.*

Marriage settlement of infant voidable at common law.

244. A settlement, or covenant to settle, made or entered into by an infant on marriage, is, at common law, not void but voidable (*h*),

(*t*) Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), ss. 18, 20, 31.

(*a*) *Ibid.*, s. 21.

(*b*) Co. Litt. 89 a; 3 Co. Inst. 156; Gib. Cod. 794; *Grange* v. *Tiving* (1665), O Bridg. 107, 117; *Arthington* v. *Coverly* (1733), 2 Eq. Cas. Abr. 518, 520; *Hearle* v. *Greenbank* (1749), 3 Atk. 695, 710; *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794, 1802; *Oddie* v. *Woodford* (1825), 3 My. & Cr. 584, 630, H. L. A presentation is not a thing of profit of which the guardian can make any benefit for the infant; and there can be no inconvenience from want of discretion on the part of the infant, since the bishop is the judge of the qualification of the clerk presented (3 Co. Inst. 156; *Hearle* v. *Greenbank, supra, per* Lord HARDWICKE, L.C., at p. 710). The guardian cannot, in law, present (Co. Litt. 89 a; Fitz. Nat. Brev. 33, T.); but there appear to have been instances where a presentation by the guardian has been accepted (Watson, Clergyman's Law, 4th ed., p. 140). See title ECCLESIASTICAL LAW, Vol. XI., p. 573.

(*c*) Watson, Clergyman's Law, 4th ed., p. 140.

(*d*) *Arthington* v. *Coverly, supra, per* Lord KING, L.C., at p. 520.

(*e*) *Arthington* v. *Coverly, supra;* see title ECCLESIASTICAL LAW, Vol. XI., p. 565. As to an agreement to augment a benefice, see *ibid.*, p. 566.

(*f*) Co. Litt. 172 a; Fitz. Nat. Brev. 34, T.; see title ECCLESIASTICAL LAW, Vol. XI., pp. 590 *et seq.*

(*g*) *Leigh* v. *Leigh*, [1902] 1 Ch. 400. As to an agreement on behalf of an infant patron for the vesting of the patronage of an augmented benefice in the person who has augmented it, see title ECCLESIASTICAL LAW, Vol. XI., p. 566.

(*h*) *Durnford* v. *Lane* (1781), 1 Bro. C. C. 106, 115; *Clough* v. *Clough* (1801), 5 Ves. 710, 717; *Milner* v. *Harewood* (*Lord*) (1811), 18 Ves. 259, *per* Lord ELDON, L.C., at pp. 275, 280; *Stamper* v. *Barker* (1820), 5 Madd. 157, 164; *Simson* v. *Jones* (1831), 2 Russ. & M. 365, 374; *Pimm* v. *Insall* (1849), 1 Mac. & G.

SECT. 10. Settlements and Covenants to settle on Marriage.

and is binding, if it is confirmed by him after attaining full age (*i*), or is not repudiated by him within a reasonable time after attaining full age (*k*). The consent of his parent or guardian gives no validity to the settlement (*l*).

Settlement by adult husband of property of infant wife.

245. In marriage settlements made before the 1st January, 1908, the covenant or assignment by an adult husband bound the personal property of an infant wife comprised therein to the same extent as before the 1st January, 1883 (*m*), in spite of the wife's repudiation of it after attaining full age (*n*); and a husband could not concur with the wife in defeating the settlement (*o*). But a settlement or agreement for a settlement on marriage made on or after the 1st January, 1908, by a husband respecting the property of an infant wife is not valid unless it is confirmed by her after attaining full age (*p*). If, however, she dies during infancy, it binds or passes any interest in the property to which he may become entitled on her death, and which he could, but for this provision, have bound or disposed of (*q*).

Impounding of interest of infant in other property.

246. If an infant repudiates a marriage settlement after attaining full age, the interest taken by the infant in property brought into

449, *per* Lord COTTENHAM, L.C., at pp. 456, 457; *Honywood* v. *Honywood* (1855), 20 Beav. 451; *Nelson* v. *Stocker* (1859), 4 De G. & J. 458, C. A.; *Kingsman* v. *Kingsman* (1880), 6 Q. B. D. 122, C. A., *per* Lord SELBORNE, L.C., at p. 127; *Smith* v. *Lucas* (1881), 18 Ch. D. 531, *per* JESSEL, M.R., at p. 543; *Cooke* v. *Cooke* (1887), 38 Ch. D. 202, *per* NORTH, J., at p. 209; *Cooper* v. *Cooper* (1888), 13 App. Cas. 88, *per* Lord MACNAGHTEN, at p. 108; *Duncan* v. *Dixon* (1890), 44 Ch. D. 211. As to the effect of foreign domicil, see title CONFLICT OF LAWS, Vol. VI., p. 279.

(*i*) *Barrow* v. *Barrow* (1858), 4 K. & J. 409; *Willoughby* v. *Middleton* (1862), 2 John. & H. 344; *Merryweather* v. *Jones* (1864), 4 Giff. 509; *Davies* v. *Davies* (1870), L. R. 9 Eq. 468; *Trowell* v. *Shenton* (1878), 8 Ch. D. 318, C. A.; *Wilder* v. *Pigott* (1882), 22 Ch. D. 263; *Greenhill* v. *North British and Mercantile Insurance Co.*, [1893] 3 Ch. 474; *Re Hodson, Williams* v. *Knight*, [1894] 2 Ch. 421.

(*k*) *Clough* v. *Clough* (1801), 5 Ves. 710, 717; *Edwards* v. *Carter*, [1893] A. C. 360, *per* Lord HERSCHELL, L.C., at p. 364; *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87, C. A., *per* LINDLEY, M.R., at p. 97. The decision of NORTH, J., in *Re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461, that a settlement by an infant might be repudiated after a lapse of twenty years appears to be inconsistent with the decision of the House of Lords in *Edwards* v. *Carter*, *supra*. An infant, by concurring in a marriage settlement, may lose the right to make a claim upon the property of the other party adversely to the settlement (*Harvey* v. *Ashley* (1748), 3 Atk. 607; *Buckinghamshire* (*Earl*) v. *Drury* (1761), 2 Eden, 60). For form of confirmation of a settlement, see Encyclopædia of Forms and Precedents, Vol. V., p. 133. As to the effect of acquiring a foreign domicil, see title CONFLICT OF LAWS, Vol. VI., pp. 234, 279.

(*l*) *Durnford* v. *Lane* (1781), 1 Bro. C. C. 105, at p. 112; *Field* v. *Moore, Field* v. *Brown* (1855), 7 De G. M. & G. 691, C. A., *per* TURNER, L.J., at pp. 706, 707.

(*m*) When the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 19, came into operation; see *ibid.*; *Stevens* v. *Trevor-Garrick*; [1893] 2 Ch. 307; *Buckland* v. *Buckland*, [1900] 2 Ch. 534. See title HUSBAND AND WIFE, Vol. XVI., pp. 325 *et seq.*

(*n*) *Stevens* v. *Trevor-Garrick*, *supra*; *Buckland* v. *Buckland*, *supra*.

(*o*) *Re London Dock Co., Ex parte Blake* (1853), 16 Beav. 463; *Sharpe* v. *Foy* (1868), 4 Ch. App. 35.

(*p*) Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 2 (1).

(*q*) *Ibid.*, s. 2 (2). See title SETTLEMENTS.

settlement by the other party, except income which a wife is restrained from anticipating during coverture (*r*), may be impounded to make up to the beneficiaries under the settlement the loss which they sustain through the repudiation (*a*).

Infant not compellable to execute settlement.

247. An infant cannot be compelled to execute a settlement of property on marriage (*b*).

SUB-SECT. 2.—*Under Infant Settlements Act.*

Settlement with the sanction of the court.

248. A male infant above the age of twenty years, and a female infant above the age of seventeen years, may upon or in contemplation of marriage (*c*), with the sanction of the Chancery Division of the High Court, make a valid settlement, or contract for a settlement, of all or any property, real or personal, whether in possession, reversion, remainder, or expectancy (*d*), to or over which he or she is entitled or has any power of appointment, not being a power expressly declared to be incapable of being exercised during infancy (*e*); and all conveyances, appointments of property, and contracts to make a conveyance or appointment, executed by the infant with the approbation of the court in order to give effect to the settlement, are as valid as if the infant were of full age (*f*). But where the infant

(*r*) *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396. As to restraint on anticipation generally, see title HUSBAND AND WIFE, Vol. XVI., pp. 359 *et seq.*

(*a*) *Hamilton* v. *Hamilton*, *supra*; *Carter* v. *Silber*, *Carter* v. *Hasluck*, [1891] 3 Ch. 553.

(*b*) *Re Potter* (1869), L. R. 7 Eq. 484; *Seaton* v. *Seaton* (1888), 13 App. Cas. 61, *per* Lord HERSCHELL, at p. 71; *Re Leigh*, *Leigh* v. *Leigh* (1888), 40 Ch. D. 290, C. A., *per* LINDLEY, L.J., at p. 296.

(*c*) Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), ss. 1, 4. The Act has been held to authorise not only an antenuptial settlement, but also a postnuptial settlement within a short time after the marriage (*Powell* v. *Oakley* (1865), 34 Beav. 575; *Re Sampson and Wall, Infants* (1884), 25 Ch. D. 482, C. A.; *Seaton* v. *Seaton*, *supra*, at pp. 68, 76; *Re Leigh*, *Leigh* v. *Leigh*, *supra*, *per* COTTON, L.J., at p. 295). As to whether it applies where the infant does not attain the prescribed age until after marriage, see *Re Phillips* (*an Infant*) (1887), 34 Ch. D. 467; *Re Leigh*, *Leigh* v. *Leigh*, *supra*, at p. 297.

(*d*) Including a legacy bequeathed after marriage (*Re Johnson*, *Moore* v. *Johnson*, [1891] 3 Ch. 48).

(*e*) Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), s. 1. The sanction is given on application by the infant, or the infant's guardian, by petition in a summary way; and, if there is no guardian, the court at its discretion may or may not require a guardian to be appointed, and may require any persons interested in the property to be served with notice of the petition (*ibid.*, s. 3). The court takes into consideration the rank and position and property of the infant and of the person whom the infant is to marry, and the fitness of the proposed trustees and their consent to act (R. S. C., Ord. 55, r. 26 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 210)). But the application does not make the infant a ward of court, or render it necessary for the court to sanction the marriage or inquire into its propriety (*Re Dalton* (1856), 6 De G. M. & G. 201; *Re Strong* (1856), 26 L. J. (CH.) 64, C. A.).

(*f*) Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), s. 1. The Act only removes the disability of infancy so far as the making of the settlement is concerned, and does not remove any disability attaching to coverture (*Seaton* v. *Seaton*, *supra*), nor the disability of infancy in respect of any subsequent act of the infant, *e.g.*, execution of a power, under the provisions of the settlement (*Re Armit's Trusts* (1871), 5 I. R. Eq. 352, 360). As to execution of a power by infants, see pp. 53, 54, *ante*.

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is tenant in tail an appointment under a power of appointment, or a disentailing assurance executed by him, is void if he dies under age (*g*). In other cases the infant may so appoint that, on failure of the limitations of the settlement, the property will become his own, whether he attains full age or dies during infancy (*h*). If the settlement has been made with the intention of including property which, owing to its character having been misrepresented, is not in fact included in it, the infant will be precluded from afterwards setting up a title to it adverse to the settlement (*i*).

SUB-SECT. 3.—*On Marriage without Requisite Consent.*

Settlement by the court on marriage without requisite consent.

249. Where a marriage between parties, each or either of whom is an infant, and is not a widower or widow, is procured by the fraud of one of the parties without the consent required by law (*k*), the court may declare a forfeiture of the nature and extent described elsewhere (*l*).

SECT. 11.—*Wills of Infant Soldiers and Seamen on Service.*

Wills of infant soldiers and seamen on service, or at sea.

250. The general incapacity of an infant to make a will (*m*) is subject, as regards personalty, to an exception in favour of infant soldiers on actual military service, and infant mariners or seamen at sea (*n*). Such persons, after attaining the age of fourteen years, can to the same extent as adults in a like position (*o*), either by a nuncupative will (*p*) or by any writing intended to be testamentary, whether signed and witnessed or not (*q*), make an effectual testamentary disposition of their personal estate (*r*).

(*g*) Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), s. 2; *Re Scott, Scott* v. *Hanbury*, [1891] 1 Ch. 298, *per* NORTH, J., at pp. 302, 303. As to the effect of an order not being acted on during infancy, see *Sams* v. *Cronin, Ex parte Reed (Maria)* (1873), 22 W. R. 204.

(*h*) *Re Scott, Scott* v. *Hanbury, supra.*

(*i*) *Mills* v. *Fox* (1887), 37 Ch. D. 153.

(*k*) See note (*g*), p. 57, *ante.*

(*l*) See title HUSBAND AND WIFE, Vol. XVI., pp. 297, 298.

(*m*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 7; see p. 49, *ante;* and as to testamentary capacity generally, see title WILLS.

(*n*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11; see *In the Goods of M'Murdo* (1867), L. R. 1 P. & D. 540.

(*o*) See title WILLS.

(*p*) 2 Bl. Com. 500; see title WILLS.

(*q*) 2 Bl. Com. 501, 502.

(*r*) Statute of Frauds (29 Car. 2, c. 3), s. 22; Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11. But see the Navy and Marines (Wills) Acts, 1865 and 1897 (28 & 29 Vict. c. 72; 60 & 61 Vict. c. 15), as to the wills of seamen and marines as defined by those Acts; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 161, 162.

Part VI.—Rights and Duties of Parents.

SECT. 1.—*Guardianship and Custody* (*s*).

SECT. 1. Guardianship and Custody.

SUB-SECT. 1.—*Rights of Father.*

Rights of father to custody.

251. A father has a natural jurisdiction over, and a right to the custody of, his child during infancy (*a*), except that in the case of a daughter the right determines on her marriage under age (*b*). The right to custody may be enforced by writ of *habeas corpus* (*c*) or by petition (*d*), and is absolute even as against the mother (*e*), and in the case of a ward of court (*f*), except where the father forfeits it by his own act or conduct (*g*).

(*s*) As to the effect of foreign domicil, see title CONFLICT OF LAWS, Vol. VI., p. 280.

(*a*) Co. Litt. 88 b, note (12) by Hargrave; *Re Agar-Ellis, Agar-Ellis* v. *Lascelles* (1883), 24 Ch. D. 317, C. A., *per* BOWEN, L.J., at pp. 335, 336; *Thomasset* v. *Thomasset*, [1894] P. 295, C. A., *per* LINDLEY, L.J., at pp. 298, 299; *Re Minelga* (1910), *Times*, 2nd June. As to the father's power to appoint a guardian of his infant child after his death, see pp. 123 *et seq.*, *post*. As to the nationality of an infant following that of his father, see title ALIENS, Vol. I., pp. 315, 318, 319.

(*b*) *Mendes* v. *Mendes* (1748), 1 Ves. Sen. 89, *per* Lord HARDWICKE, L.C., at p. 91; *Roach* v. *Garvan* (1748), Belt's Sup. 86.

(*c*) *R.* v. *Ward* (1762), 1 Wm. Bl. 386; *Re Pearson* (1820), 4 Moore (C. P.), 366; *Re Pulbrook* (1847), 11 Jur. 185; *Re Lyons, an Infant* (1869), 22 L. T. 770; see also title CROWN PRACTICE, Vol. X., pp. 52, 53. *Habeas corpus* will not be granted to an agent (*R.* v. *Scherschewsky* (1892), 8 T. L. R. 571). Where a person has, before the application to the court, handed over the infant, even illegally, to a third person, a writ of *habeas corpus* will not be issued (*Barnardo* v. *Ford*, *Gossage's Case*, [1892] A. C. 326, overruling *R.* v. *Barnardo* (1889), 23 Q. B. D. 305, C. A., and affirming *R.* v. *Barnardo* (1890), 24 Q. B. D. 283, C. A.), though in the circumstances of that case the writ was issued. But it is no sufficient answer to a writ to say that the child is not in the custody of the person against whom the application is made without stating whether he knows where the child is or by whom it was taken (*Re Matthews* (1859), 12 I. C. L. R. 233; *R.* v. *Roberts* (1860), 2 F. & F. 272).

(*d*) *Re Spence* (1847), 2 Ph. 247.

(*e*) *R.* v. *De Manneville* (1804), 5 East, 221; *R.* v. *Greenhill* (1836), 4 Ad. & El. 634; *Re Hakewill* (1852), 12 C. B. 223; *Re Thomas* (1853), 22 L. J. (CH.) 1075; *Ex parte Young* (1855), 26 L. T. (O. S.) 92; *Cartlidge* v. *Cartlidge* (1862), 2 Sw. & Tr. 567; *Re Plomley, Vidler* v. *Collyer* (1882), 47 L. T. 283, C. A., *per* BACON, V.-C., at p. 284; *Re Agar-Ellis, Agar-Ellis* v. *Lascelles, supra*; *Re Watson*, (*an Infant*) (1884), 1 T. L. R. 52; *Bjorkman* v. *Bjorkman* (1910), *Times*, 8th September. But in such a case provision may be made for access by the mother to the infant (*Re Halliday's Estate, Ex parte Woodward* (1852), 17 Jur. 56; *Constable* v. *Constable* (1886), 34 W. R. 649).

(*f*) *Re Agar-Ellis, Agar-Ellis* v. *Lascelles, supra.*

(*g*) *Cruise* v. *Hunter* (1790), 2 Bro. C. C. 500 (Belt's ed., n. (1)); *Ex parte Warner* (1792), 4 Bro. C. C. 101; *De Manneville* v. *De Manneville* (1804), 10 Ves. 52; *Ex parte Skinner* (1824), 9 Moore (C. P.), 278; *Wellesley* v. *Beaufort* (*Duke*) (1827), 2 Russ. 1. Jurisdiction to interfere with the father's right under such circumstances was formerly confined to the Court of Chancery (*Ex parte Skinner, supra*; *Re Hakewill, supra*); but it can now be exercised by all divisions of the High Court of Justice (Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 25, which enacted that "In questions relating to the custody and education of children the rules of equity shall prevail" (*ibid.*, s. 25 (10); *Re Goldsworthy* (1876), 2 Q. B. D. 75; *R.* v. *Gyngall*, [1893] 2 Q. B. 232, C. A.; *Thomasset* v. *Thomasset, supra*, overruling *Blandford* v. *Blandford*, [1892] P. 148). The possession of property by the infant is not an essential condition to the interference of the court (*Re Spence* (1847), 2 Ph. 247, *per* Lord

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The High Court will exercise its jurisdiction to interfere in the interests of a child (*h*) on account of the father's conduct, if it is satisfied that he has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the child, but practically essential to his safety or to his welfare in some very serious and important respect, that the father's right should be treated as lost or suspended, and should be superseded or interfered with (*i*). Interference will be justified by actual cruelty of the father either to his wife or child (*j*), or by his avowal and adoption of principles of an irreligious and immoral character (*k*).

Choice by infant.

If the infant is of an age to exercise a choice, the court will take his wishes into consideration (*l*).

Power to transfer custody.

In a deed of separation (*m*) between the father and mother of an infant child, the father may agree to give up the custody and control of the child to the mother (*n*); but such an agreement is not

COTTENHAM, L.C., at p. 252; *Re Fynn* (1848), 2 De G. & Sm. 457, *per* KNIGHT BRUCE, V.-C., at p. 481; *Re A. B., an Infant* (1885), 1 T. L. R. 657; *Re McGrath* (*Infants*), [1893] 1 Ch. 143, 147, C. A.).

(*h*) See note (*g*), p. 105, *ante*.

(*i*) *Re Fynn, supra, per* KNIGHT BRUCE, V.-C., at pp. 474, 475; *Re Goldsworthy*, (1876), 2 Q. B. D 75, *per* Lord COLERIDGE, C.J., at pp. 82 *et seq.* Mere immorality on the part of the father is not sufficient to justify interference (*Ball* v. *Ball* (1827), 2 Sim. 35; *Re Goldsworthy, supra*, at p. 82), unless it is very flagrant (*Warde* v. *Warde* (1849), 2 Ph. 786) or of a gross kind (*Anon.* (1851), 2 Sim. (N. S.) 54), or is coupled with other habits injurious to the child (*Wellesley* v. *Beaufort* (*Duke*) (1827), 2 Russ. 1; *Re Cormicks, Minors* (1840), 2 I. Eq. R. 264).

(*j*) *Ex parte Warner* (1792), 4 Bro. C. C. 101; *Whitfield* v. *Hales* (1806), 12 Ves. 492. But merely harsh treatment of the wife (*Re Spence, supra, per* Lord COTTENHAM, L.C., at p. 252) or mere harshness towards the child (*Blake* v. *Wallscourt* (*Lord*) (1846), 7 L. T. (o. s.) 545) is not sufficient.

(*k*) *Shelley* v. *Westbrooke* (1817), Jac. 266.

(*l*) *R.* v. *Delaval* (1763), 3 Burr. 1434; *R.* v. *Greenhill* (1836), 4 Ad. & El. 624, *per* Lord DENMAN, C.J., at p. 640; *Re Andrews* (1873), L. R. 8 Q. B. 153, *per* ARCHIBALD, J., at p. 158. There is no English case which decides at what age a male infant can exercise a choice, but in Ireland it has been held that he can do so at fourteen years (*Re Shanahan* (1852), 20 L. T. (o. s.) 183; *Re Connor* (1878), 11 I. R. C. L. 112). As regards females, the age has been held in England to be sixteen years (*R.* v. *Howes* (1860), 3 E. & E. 332); *Cartlidge* v. *Cartlidge* (1862), 2 Sw. & Tr. 567; *Mallinson* v. *Mallinson* (1866), L. R. 1 P. & D. 221). See also *R.* v. *Clarke* (1857), 7 E. & B. 186; *Re Race* (*Alicia*), *an Infant* (1857), cited in *Gurney* v. *Gurney* (1863), 1 Hem. & M. 413, 420, n. (a). The power of choice depends on age alone, and not on mental capacity (*R.* v. *Clarke, supra*; *Re Andrews, supra*, at p. 159; *Re Shanahan, supra*).

(*m*) As to which see, generally, title HUSBAND AND WIFE, Vol. XVI., pp. 439 *et seq.*

(*n*) Custody of Infants Act, 1873 (36 & 37 Vict. c. 12), s. 2. Such an agreement was formerly held invalid as contrary to public policy (*St. John* (*Lord*) v. *St. John* (*Lady*) (1805), 11 Ves. 526, *per* Lord ELDON, L.C., at p. 531; *Re Westmeath's* (*Lord*) *Children* (1819), cited in *Lyons* v. *Blenkin* (1821), Jac. 245, 251, n. (c); *Hope* v. *Hope* (1857), 8 De G. M. & G. 731, 738, 739, C. A.; *Vansittart* v. *Vansittart* (1858), 2 De G. & J. 249, C. A.; *Walrond* v. *Walrond* (1858), John. 18); except where the father had been guilty of gross misconduct so that it was in the interests of the infant that he should not have the custody (*Swift* v. *Swift* (1865), 34 Beav. 266; *Hamilton* v. *Hector* (1872), L. R. 13 Eq. 511, *per* Lord ROMILLY, M.R., at p. 520). As to the court considering the interests of the infant, see the text, *supra*. See also title HUSBAND AND WIFE, Vol. XVI., p. 449. For form of such an agreement, see Encyclopædia of Forms and Precedents, Vol. II., pp. 425, 429.

enforceable where the court, before which proceedings to enforce it are taken, considers that such enforcement would not be for the benefit of the child (*o*). Where in any other case a father agrees to surrender his right of custody, or any other of his rights in respect of his infant, to another person, the agreement can be cancelled by him at any time before it is carried out (*p*). After a surrender by him of the custody has actually taken place, he can recover the custody (*q*), unless his doing so would be injurious to the interests of the child (*r*).

Right to chastise.

252. A father has the right to restrain and control the acts and conduct of his infant child, and to inflict correction on the child for disobedience to his orders by personal and other chastisements to a reasonable extent (*s*). He may delegate this right to a tutor, or schoolmaster, or other person (*t*).

Right to services of infant child.

253. A father has the right to the services of such of his children who reside with him and are infants (*u*).

SUB-SECT. 2.—*Rights of Mother.*

Right of mother as against father.

254. The mother of an infant child has generally during the lifetime of the father no rights as against him with respect to the custody and control of such child (*v*) except in the manner and to

(*o*) Custody of Infants Act, 1873 (36 & 37 Vict. c. 12), s. 2; *Re Besant* (1879), 11 Ch. D. 508, C. A.; *Hart* v. *Hart* (1881), 18 Ch. D. 670, *per* KAY, J., at pp. 681 *et seq.*

(*p*) *Hill* v. *Gomme* (1839), 1 Beav. 540; *Re Browne, a Minor* (1852), 2 I. Ch. R. 151, 162; *Re Boreham, R.* v. *Smith* (1853), 22 L. J. (Q. B.) 116; *Kennedy* v. *May* (1863), 7 L. T. 819; *Re Meades, Minors* (1871), 5 I. R. Eq. 98, 111; *Andrews* v. *Salt* (1873), 8 Ch. App. 622, 636; *R.* v. *Barnardo* (1889), 23 Q. B. D. 305, *per* Lord ESHER, M.R., at p. 310; disapproved, on another point, in *Barnado* v. *Ford, Gossage's Case*, [1892] A. C. 326.

(*q*) *Re Boreham, R.* v. *Smith, supra.*

(*r*) *Blake* v. *Leigh* (1756), Amb. 306; *Fagnani* v. *Selwyn* (1787), Jac. 268; *Colston* v. *Morris* (1819), Jac. 257, n. (a); *Lyons* v. *Blenkin* (1821), Jac. 245.

(*s*) 1 Hawk. P. C., c. 61, s. 23; 1 Bl. Com. 452, 453; *R.* v. *Hopley* (1860), 2 F. & F. 202, *per* COCKBURN, C.J., at pp. 206, 207; *Halliwell* v. *Counsell* (1878), 38 L. T. 176.

(*t*) 1 Bl. Com. 453; *Ex parte M'Clellan* (1831), 1 Dowl. 81; *R.* v. *Hopley, supra*, at p. 206; *Fitzgerald* v. *Northcote* (1865), 4 F. & F. 656, *per* COCKBURN, C.J., at p. 689; and see title EDUCATION, Vol. XII., p. 124. The person to whom the right is delegated stands *in loco parentis* towards the child (1 Bl. Com. 453). The right in the case of a schoolmaster extends to correction for acts done on the way to school (*Cleary* v. *Booth*, [1893] 1 Q. B. 465).

(*u*) *Jones* v. *Brown* (1795), Peake, 306, [233]; *Hall* v. *Hollander* (1825), 4 B. & C. 660; *Evans* v. *Walton* (1867), L. R. 2 C. P. 615, *per* BOVILL, C.J., at p. 619. Accordingly slight evidence of actual service is sufficient to maintain an action by a father for damages, grounded on loss of service in case of the seduction of a daughter, or other injury to a child residing with him (*Fores* v. *Wilson* (1791), Peake, 77, [55], *per* Lord KENYON, C.J.); *Jones* v. *Brown, supra*; *Evans* v. *Walton, supra*). The right to service extends to children of full age (*Bennett* v. *Allcott* (1787), 2 Term Rep. 166; *Booth* v. *Charlton* (1789), cited in *Dean* v. *Peel* (1804), 5 East, 45, 47; *Johnson* v. *M'Adam* (1789), cited in *Dean* v. *Peel, supra*, at p. 47). As to the relief which may be given by a court of summary jurisdiction on an application by the father, see title HUSBAND AND WIFE, Vol. XVI., p. 599.

(*v*) See pp. 105 *et seq.*, *ante*. But under special circumstances she may be allowed to retain the custody of an infant child as against the father (see p. 109, *post*), and, when the father has been convicted of felony, may obtain a writ of *habeas corpus* (*Ex parte Bailey* (1838), 6 Dowl. 311).

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the extent conferred by the Guardianship of Infants Act, 1886 (*a*). Upon her application, the Chancery Division of the High Court of Justice, or the county court of the district in which any respondent to the application resides, may make such order as it thinks fit with regard to the custody of the infant, and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes of the mother as well as of the father (*b*).

In case of misconduct of father.

The mother may, in certain cases, obtain an order from a court of summary jurisdiction (*c*), or, where the father was convicted on indictment, from the court before whom he was convicted, for the committal to her of the legal custody of their infant children up to the age of sixteen years (*d*).

Right to guardianship.

255. Upon the death of the father the mother has a common law right to the custody of a child of tender years as natural guardian or guardian for nurture, unless she has forfeited it by misconduct (*e*). She is also after his death guardian by statute of an infant child, either alone if the father has not appointed a guardian, or, if he has done so, jointly with such guardian (*f*). In case of the father having appointed no guardian, or of the guardian appointed by him being dead, or refusing to act, the Chancery Division of the High Court of Justice, or the county court of the district in which any respondent to an application made for the purpose resides, may, from time to time appoint one or more guardians to act jointly with the mother (*g*). The High Court may remove

(*a*) 49 & 50 Vict. c. 27, s. 5.

(*b*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 5, 9; *Re A. and B., Infants*, [1897] 1 Ch. 786, C. A. The infant may be committed to the custody of the mother without any limit as to age (*Re Witten (an Infant)* (1887), 3 T. L. R. 811; 4 T. L. R. 36). The mother may apply without a next friend; and the order may be varied or discharged on the application of either parent, or after the death of either parent on the application of a testamentary guardian (Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 5). The matters which the court will take into consideration, when asked to give the custody of an infant to a mother, are discussed in many cases under the now repealed statute (1839) 2 & 3 Vict. c. 54, and Custody of Infants Act, 1873 (36 & 37 Vict. c. 12); see *Re Taylor* (1840), 11 Sim. 178; *Re Bartlett, Ex parte Bartlett* (1846), 2 Coll. 661; *Warde* v. *Warde* (1848), 2 Ph. 786; *Re Halliday's Estate, Ex parte Woodward* (1852), 17 Jur. 56; *Re Taylor, an Infant* (1876), 4 Ch. D. 157; *Re Holt* (1880), 16 Ch. D. 115, C. A.; *Re Elderton* (1883), 25 Ch. D. 220; *Re Russell* (1887), 83 L. T. Jo. 202.

(*c*) See Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), ss. 4, 5.

(*d*) *Ibid.*, ss. 4, 5 (b). See title HUSBAND AND WIFE, Vol. XVI., pp. 596, 599. As to courts of summary jurisdiction generally, see title MAGISTRATES.

(*e*) *Re O'Hara*, [1900] 2 I. R. 232, C. A., *per* FITZGIBBON, L.J., at p. 239; and see p. 123, *post*. As to the nationality of an infant following that of its widowed mother, see title ALIENS, Vol. I., pp. 315, 318, 319.

(*f*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 2; see pp. 123 *et seq.*, *post*.

(*g*) *Ibid.* The court will not add a guardian merely because the mother has married a second husband of a different faith from that of the father, and the child, and her own, nor otherwise unless it is clearly for the infant's benefit (*Re X., X.* v. *Y.*, [1899] 1 Ch. 526, C. A.), but will do so where the mother herself is of a different faith from the father (*Re Scanlan, Infants* (1888), 40 Ch. D. 200; see also *R.* v. *Williams* (1888), 58 L. J. (Q. B.) 176; *R.* v. *Barnardo* (No. 2) (1889), 58 L. J. (Q. B.) 522; *F.* v. *F.*, [1902] 1 Ch. 688).

the mother as well as any other guardian from the guardianship of an infant child if it considers that the welfare of the infant so requires (*h*).

SUB-SECT. 3.—*Loss of Rights of Parents* (*i*).

Right of custody, when recoverable.

256. A father, whose infant child is not in his custody, and a mother, where she is entitled to the custody, may, in the absence of good reason to the contrary, obtain the custody of the child by a writ of *habeas corpus* (*k*). The application of a parent to the court for the custody of a child may be refused, if the court is of opinion that the parent has abandoned or deserted the child, or has otherwise been guilty of such conduct that the court ought to refuse to enforce the right to the custody of the child (*l*). Where the parent has abandoned or deserted the child, or has allowed the child to be brought up by, and at the expense of, another person, or by a school or institution, or by the guardians of a poor law union for such length of time, and in such circumstances, as to satisfy the court that the parent has been unmindful of the parental duties owed to the child, the court may not make an order for the delivery of the child to the parent, unless satisfied as to the fitness of the parent to have the custody, having regard to the welfare of the child (*m*).

Loss of right by father.

A father may in certain circumstances be deprived of the custody of his infant child in favour of the mother (*n*) or of guardians appointed by a court of competent jurisdiction (*o*).

Choice of infant.

Where an infant, who has passed tender years and is of a reasonable age, is out of a parent's custody, and desires to remain

(*h*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 6; see pp. 125, 126, *post*.

(*i*) As to where questions of domicil and foreign law arise, see title CONFLICT OF LAWS, Vol. VI., p. 280. As to the validity of a provision in a separation deed for the giving up by the father of custody and control of the children, see title HUSBAND AND WIFE, Vol. XVI., p. 449; and pp. 106, 107, *ante*.

(*k*) *R.* v. *De Manneville* (1804), 5 East, 221; *R.* v. *Greenhill* (1836), 4 Ad. & El. 624; *Re Hakewill* (1852), 12 C. B. 223; *Re Moore* (1859), 11 I. C. L. R. 1; *R.* v. *Howes* (1860), 3 E. & E. 332; *Re Suttor* (*Emily*) (1860), 2 F. & F. 267; *Re O'Hara*, [1900] 2 I. R. 232, C. A.; *Re Bell* (1908), 43 I. L. T. 35.

(*l*) Custody of Children Act, 1891 (54 & 55 Vict. c. 3), s. 1; and see pp. 105, 106, *ante*. The word "parent" includes any person at law liable to maintain the child or entitled to his custody (Custody of Children Act, 1891 (54 & 55 Vict. c. 3), s. 5; and compare note (*a*), p. 110, *post*). If when the application is made the child is being brought up by another person, or by a school or institution, or is boarded out by the guardians of a poor law union, the court may in its discretion, if it orders the child to be given up to the parent, further order that the parent shall pay to such persons, or school or institution, or guardians, the whole or a reasonable portion of the costs incurred in bringing up the child (Custody of Children Act, 1891 (54 & 55 Vict. c. 3), ss. 2, 5).

(*m*) *Ibid.*, ss. 3, 5; *Re Preston* (1848), 5 Dow. & L. 233; *R.* v. *Gyngall*, [1893] 2 Q. B. 232, 237, C. A.; *Re Elliott, an Infant* (1893), 32 L. R. Ir. 504; *Re Skeffington* (1908), 43 I. L. T. 245.

(*n*) *Re Fynn* (1848), 2 De G. & Sm. 457; *Re Goldsworthy* (1876), 2 Q. B. D. 75; *Re Brown* (*Ethel*) (1884), 13 Q. B. D. 614; and see p. 108, *ante*.

(*o*) *Wellesley* v. *Wellesley* (1828), 2 Bli. (N. S.) 124, H. L.; see p. 126, *post*.

SECT. 1. Guardianship and Custody.

out of it, he will not be compelled to return to it, if his welfare does not so require (*p*).

Protection of girl.

257. Where on the trial of any offence under the Criminal Law Amendment Act, 1885 (*q*), the court is satisfied that the seduction or prostitution of any girl, under the age of sixteen years, has been caused, encouraged or favoured by her father or mother, or by her guardian, or master or mistress, the court may divest him or her of all authority over the girl, and may appoint any person, willing to take charge of her, to be her guardian until she attains full age, or for any shorter period (*r*).

Ill-treatment of infant.

Where child has parents or guardian.

Where a person having the custody, charge or care of an infant under the age of sixteen years, is either (1) convicted of, or committed for trial for any of certain offences of cruelty or otherwise against the person of the infant (*s*), or (2) bound over to keep the peace towards the infant by any court, that court or any petty sessional court may make an order depriving such person of the custody, charge or care of the infant, and committing the infant to the custody of some relative or other fit person until the infant attains the age of sixteen, or for any shorter period (*t*). If the infant has a parent (*a*) or legal guardian (*b*), the order is not to be made unless the parent or legal guardian has been convicted of or committed for trial for the offence, or is under committal for trial for having been, or has been proved to the satisfaction of the court to have been, party or privy to the offence, or has been bound over to keep the peace towards the infant, or cannot be found (*c*).

Infant convicted of felony.

258. Where an infant has been convicted of felony, the Chancery Division of the High Court may, upon the application of any person willing to take charge of him and provide for his maintenance and education, assign the custody of him during his minority, or for any shorter period (*d*).

(*p*) *Ex parte Hopkins* (1732), 3 P. Wms. 152; *R.* v. *Howes* (1860), 3 E. & E. 332, *per* COCKBURN, C.J., at pp. 336, 337; *Re Agar-Ellis, Agar-Ellis* v. *Lascelles* (1883), 24 Ch. D. 317, C. A., *per* COTTON, L.J., at p. 331, *per* BOWEN, L.J., at pp. 335, 337; *Re McGrath, Infants*, [1893] 1 Ch. 143, 150, C. A.

(*q*) 48 & 49 Vict. c. 69.

(*r*) *Ibid.*, s. 12. The High Court may from time to time rescind or vary the order by the appointment of another guardian or in any other respect (*ibid.*).

(*s*) *I.e.*, those offences specified in the Children Act, 1908 (8 Edw. 7, c. 67), Part II. and Sched. I.

(*t*) *Ibid.*, s. 21. The Home Secretary may authorise the emigration of the infant where it appears to be for his benefit (*ibid.*, s. 21 (6)).

(*a*) "Parent" under the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 23, includes a step-parent, and any person cohabiting with the parent of the child, a guardian, and every person legally liable to maintain the child, but the father of an illegitimate child is not a parent within the Act until declared to be so by affiliation proceedings (*Butler* v. *Gregory* (1902), 18 T. L. R. 370). This provision was not repealed by the Children Act, 1908 (8 Edw. 7, c. 67).

(*b*) *I.e.*, a person appointed guardian according to law by deed or will, or by the court (Children Act, 1908 (8 Edw. 7, c. 67), s. 131).

(*c*) *Ibid.*, s. 21 (2); and as to other provisions for safety of children, see pp. 158 *et seq.*, *post*.

(*d*) Infant Felons Act, 1840 (3 & 4 Vict. c. 90). The infant is not to be sent

In case of divorce proceedings.

259. Where a decree of judicial separation or a decree of divorce, whether *nisi* or absolute, or a decree of nullity (*e*), is pronounced, the court has an absolute discretion to give the custody of the infant children of the marriage to either parent, and to regulate the access of the other parent to them (*f*), and may allow a third party to intervene where neither parent is fit in the opinion of the court to have the custody of the children (*g*).

The court may also declare the guilty parent to be unfit to have the custody of such children (*h*).

SUB-SECT. 4.—*Adoption.*

Actual adoption not recognised by law.

260. Adoption, in the sense of the transfer of parental rights and duties in respect of a child to another person and their assumption by him, is not recognised by the law of England (*i*). But a relative or a stranger may put himself *in loco parentis* towards a child (*k*), and certain legal consequences as between the parties result from that position (*l*).

beyond the seas or out of the jurisdiction of the court (Infant Felons Act, 1840 (3 & 4 Vict. c. 90), s. 2). The assignment may from time to time be rescinded or varied (*ibid.*, s. 1).

(*e*) *Langworthy* v. *Langworthy* (1886), 11 P. D. 85, C. A.

(*f*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 35; Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 4; *Spratt* v. *Spratt* (1858), 1 Sw. & Tr. 215; *Suggate* v. *Suggate* (1859), 29 L. J. (P. & M.) 167; *Ryder* v. *Ryder* (1861), 30 L. J. (P. M. & A.) 44; *Skinner* v. *Skinner* (1888), 13 P. D. 90; *Handford* v. *Handford* (1890), 63 L. T. 256; *Handley* v. *Handley*, [1891] P. 124, C. A., *per* LINDLEY, L.J., at p. 127; *Witt* v. *Witt*, [1891] P. 163; *Webley* v. *Webley* (1891), 64 L. T. 839. But the court will require a very strong case to be made out against a father before declaring him unfit to have the custody of his children (*Woolnoth* v. *Woolnoth* (1902), 86 L. T. 598), and in taking away the custody from him will not deprive him of exercising parental judgment and discrimination in respect of the children (*Maudslay* v. *Maudslay* (1877), 2 P. D. 256, *per* HANNEN, P., at p. 260). The court may after divorce allow the father to resume the custody of the children which he has given to the mother by a prior separation deed (*Jump* v. *Jump* (1883), 8 P. D. 159, *per* HANNEN, P., at p. 160). See also title HUSBAND AND WIFE, Vol. XVI., pp. 521, 577.

(*g*) *Chetwynd* v. *Chetwynd* (1865), L. R. 1 P. & D. 39; *Godrich* v. *Godrich* (1873), L. R. 3 P. & D. 134. But see *Davis* v. *Davis* (1889), 14 P. D. 162, where such intervention took place after the death of the parent who had the custody.

(*h*) As to declarations of unfitness for custody, see Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 7; and title HUSBAND AND WIFE, Vol. XVI., p. 545.

(*i*) *Humphrys* v. *Polak*, [1901] 2 K. B. 385, C. A., *per* STIRLING, L.J., at p. 390. For form of agreement to adopt a child, see Encyclopædia of Forms and Precedents, Vol. I., p. 226. The seduction of an adopted daughter is an injury for which damages are not limited by the mere loss of service (*Irwin* v. *Dearman* (1809), 11 East, 23).

(*k*) A person puts himself *in loco parentis* towards a child when he undertakes the office and duty of a father to make provision for the child (*Powys* v. *Mansfield* (1837), 3 My. & Cr. 359, *per* Lord COTTENHAM, L.C., at pp. 366 *et seq.*). The fact that a child has a father living with whom it resides and by whom it is maintained affords an inference against the position being assumed by another (*ibid.*, at p. 368). A father does not stand *in loco parentis* towards an illegitimate child, unless he voluntarily puts himself in that position by his acts and conduct (see note (*p*), p. 114, and p. 120, *post*). As to presumption of undue influence in this connection, see titles EQUITY, Vol. XIII., p. 18; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 107, 108; GIFTS, Vol. XV., p. 420.

(*l*) See pp. 118 *et seq*, *post*.

SECT. 2. Religion.

SECT. 2.—*Religion.*

Right of father to determine religion.

261. In the absence of good reason to the contrary a father has the right to determine in what religion his infant child shall be brought up (*m*), and he cannot effectually deprive himself beforehand of that right by an agreement to the contrary, either before and in consideration of marriage or otherwise (*n*). The right continues until the child attains full age (*o*). If, however, a father waives his right by allowing a child to be brought up in a different religion, he may be precluded from afterwards asserting it (*p*).

Waiver of right.

Loss of right.

A father may lose the right by his own immoral conduct (*q*), or by the profession of opinions which have an immoral or irreligious tendency (*r*).

After death of father.

262. The right continues after his death in spite of the mother being of a different religion (*s*); and if he has left no directions on the subject the court will direct that the infant shall be brought up in the father's religion (*t*). But the father's right, and even his express directions on the subject, may be interfered with if he has so acted as to waive or abdicate his right (*a*), as, for instance, if the mother has been allowed to bring up the infant in her own religion for a long period without interference (*b*), or if the welfare of the infant, which is the primary consideration, renders it

(*m*) *Re Meades, Minors* (1871), 5 I. R. Eq. 98; *D'Alton* v. *D'Alton* (1878), 4 P. D. 87; *Re Agar-Ellis, Agar-Ellis* v. *Lascelles* (1878), 10 Ch. D. 49, 71 *et seq.*, C. A.; *Re Scanlan, Infants* (1888), 40 Ch. D. 200, *per* STIRLING, J., at p. 207. As to religious education, see title EDUCATION, Vol. XII., pp. 61, 75, 89, 90, 106 *et seq.*

(*n*) *Re Boreham, R.* v. *Smith* (1853), 22 L. J. (Q. B.) 116; *Andrews* v. *Salt* (1873), 8 Ch. App. 622; *D'Alton* v. *D'Alton, supra*; *Re Agar-Ellis, Agar-Ellis* v. *Lascelles, supra*, at pp. 70, 71; *Re Nevin* (*Violet*), *an Infant*, [1891] 2 Ch. 299, C. A. See also title CONTRACT, Vol. VII., p. 396.

(*o*) *Re Agar-Ellis, Agar-Ellis* v. *Lascelles* (1883), 24 Ch. D. 317, C. A., *per* BRETT, M.R., at p. 326. But as to where an infant has deliberately adopted another religion, see *Re Lyons* (*an Infant*) (1869), 22 L. T. 770.

(*p*) *Lyons* v. *Blenkin* (1821), Jac. 245, *per* Lord ELDON, L.C., at p. 260; *Re Shanahan* (1852), 20 L. T. (O. S.) 183; *Re Newton* (*Infants*), [1896] 1 Ch. 740, C. A.

(*q*) *Shelley* v. *Westbrooke* (1817), Jac. 266.

(*r*) *Ibid.*; *Thomas* v. *Roberts* (1850), 3 De G. & Sm. 758.

(*s*) *Witty* v. *Marshall* (1841), 1 Y. & C. Ch. Cas. 68; *Re Hunt, a Minor* (1843), 2 Con. & Law. 373; *Re North* (1846), 11 Jur. 7; *Re Browne, a Minor* (1852), 2 I. Ch. R. 151; *Re Race* (*Alicia*), *an Infant* (1857), cited in *Gurney* v. *Gurney* (1863), 1 Hem. & M. 413, 420, n. (a); *Davis* v. *Davis* (1862), 10 W. R. 245; *Re Austin, Austin* v. *Austin* (1865), 34 L. J. (CH.) 499; *Hawksworth* v. *Hawksworth* (1871), 6 Ch. App. 539, *per* JAMES, L.J., at p. 542, *per* MELLISH, L.J., at pp. 544, 545.

(*t*) *Re Newbery* (1866), 1 Ch. App. 263; *Hawksworth* v. *Hawksworth, supra*. Even where the mother and infant are out of the jurisdiction (*Re Montagu, Re Wroughton, Montagu* v. *Festing* (1884), 28 Ch. D. 82).

(*a*) *Hill* v. *Hill* (1862), 10 W. R. 400.

(*b*) *Corbet* v. *Tottenham* (1808), 1 Ball & B. 59; *Re Kellers, Minors* (1856), 5 I. Ch. R. 328; *Re O'Malleys, Minors, Ex parte O'Malley, Ex parte Robinson* (1858), 8 I. Ch. R. 291; *Hill* v. *Hill, supra*; *Re Clarke* (1882), 21 Ch. D. 817; especially if the infant has formed definite religious opinions in a particular direction (*Re Kellers, Minors, supra*; *Re Fallon, Minors* (undated) cited in *Re Kellers, Minors, supra*, at pp. 328, 339).

desirable (*c*). This will be the case when the application to the court on the subject has been delayed for many years after the father's death, and the infant has meanwhile been brought up in a different religion (*d*), or where the latter desires to adopt a different faith (*e*).

Antenuptial agreement.

Where there has been an antenuptial agreement as to the religious education of the children of the marriage, the courts will, after the death of the father, take the fact into consideration as an indication that the father had abandoned his right (*f*).

Examination of the infant.

In taking the welfare of the infant into consideration the court will sometimes examine him with a view to ascertain the extent of the religious impressions which he has formed and the inadvisability of his receiving in the future different religious instruction (*g*).

Religion other than Christian.

263. In dealing with the question of religion the court usually only regards some form of Christian religion (*h*), or the Jewish religion (*i*). But different considerations will prevail in the case of the child of an Indian (*k*).

Direction as to religion where custody is not given to parent.

264. Where, upon an application by a parent for the production or custody of an infant child, a court considers that the parent ought not to have the custody of the infant, but finds that the infant is being brought up in a different religion to that in which the parent has a legal right to require that the child should be brought up, the court may make an order securing that the infant shall be brought up in the religion in which the parent has a legal right to require that he should be brought up (*l*).

(*c*) *Andrews* v. *Salt*, (1873), 8 Ch. App. 622; *Re Clarke* (1882), 21 Ch. D. 817; *Re McGrath* (*Infants*), [1893] 1 Ch. 143, C. A. But the pecuniary or worldly interests of the infant will not be taken into consideration (*Talbot* v. *Shrewsbury* (*Earl*), *Doyle* v. *Wright* (1840), 4 My. & Cr. 672, *per* Lord COTTENHAM, L.C., at p. 688; *Re Kellers, Minors* (1856), 5 I. Ch. R. 328, 339).

(*d*) *Stourton* v. *Stourton* (1857), 8 De G. M. & G. 760, C. A., *per* TURNER, L.J., at p. 772.

(*e*) *Re W., W.* v. *M.*, [1907] 2 Ch. 557, C. A., where a boy aged thirteen desired to change from the Jewish to the Christian faith.

(*f*) *Andrews* v. *Salt, supra*; *Re Clarke, supra.*

(*g*) *Re Browne, a Minor* (1858), 8 I. Ch. R. 172; *Stourton* v. *Stourton, supra*, at pp. 767, 768; *Re Newton* (*Infants*), [1896] 1 Ch. 740, 743, 751, C. A.; *Re W., W.* v. *M., supra*. But in other cases an interview with the infant has been considered undesirable (*Davis* v. *Davis* (1862), 10 W. R. 245; *Re Newbery* (1866), 1 Ch. App. 263, 266; *Hawksworth* v. *Hawksworth, supra*; *Re Nevin* (*Violet*), *an Infant*, [1891] 2 Ch. 299, 307, C. A.). In the case of any order dealing with a ward of court in regard to the religion in which such ward is to be brought up, the words "until further order" must, from the nature of the case, be deemed to be inserted (*Re W., W.* v. *M., supra, per* COZENS-HARDY, M.R., at p. 570).

(*h*) *Skinner* v. *Orde* (1871), L. R. 4 P. C. 60; *Re Nevin* (*Violet*), *an Infant, supra*, at p. 309.

(*i*) *Re W., W.* v. *M., supra.*

(*k*) *Re Ullee, Nawab Nazim of Bengal's Infants* (1885), 54 L. T. 286, C. A.

(*l*) Custody of Children Act, 1891 (54 & 55 Vict. c. 3), s. 4. The court has full power to consult the wishes of the child in considering what order shall be made; and the power of the court to make the order does not diminish the right which the infant otherwise possesses to the exercise of his own free choice (*ibid.*).

SECT. 3. Maintenance and Education.

SECT. 3.—*Maintenance and Education.*

SUB-SECT. 1.—*Protection.*

Duty of protection.

265. The natural duty of a parent to protect an infant child justifies acts of personal violence in defence of the child (*m*), and the upholding and maintaining of the child in a lawsuit (*n*).

SUB-SECT. 2.—*Maintenance and Education.*

Duty of maintenance.

266. Except under the operation of the poor law, there is no actual legal obligation on a father or mother to maintain a child, unless the neglect to do so would bring the case within the criminal law (*o*). A father who wilfully refuses or neglects to maintain his children, or who runs away and leaves them, so that they are chargeable to a union or parish, is criminally liable (*p*). But the moral duty of a father to maintain his infant children (*q*), and also, where he has put himself *in loco parentis* towards them, the infant children of his wife by a former marriage (*r*), has been recognised by the courts, which have refused to allow maintenance out of the property of infants where the father is in a position to maintain them (*s*), and have presumed, in the absence of evidence to the contrary, that a person with whom they are living with his consent is authorised to contract debts on his behalf to provide them with necessaries (*t*), and have granted an allowance for their maintenance out of the estate of a lunatic father (*a*). The moral obligation exists, but is not considered so strong, in the case of a mother (*b*).

(*m*) 1 Bl. Com. 450; 1 Hawk. P. C. c. 61, s. 23. It is doubtful how far *Royley's Case* (1612), Cro. Jac. 296 (referred to in 1 Hawk. P. C. c. 31, s. 37; 1 Bl. Com. 450; and cited in *R.* v. *Oneby* (1727), 2 Ld. Raym. 1485, 1492) was decided on this principle (Fost. 294, 295).

(*n*) 2 Co. Inst. 564; 1 Bl. Com. 450.

(*o*) *Cooper* v. *Martin* (1803), 4 East, 76, *per* LAWRENCE, J., at p. 84; *Bazeley* v. *Forder* (1868), L. R. 3 Q. B. 559, *per* COCKBURN, C.J., at p. 565. As to criminal neglect of an infant under the age of sixteen, see p. 110, *ante*, and pp. 162 *et seq.*, *post*.

(*p*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), ss. 3, 4; see *Hosegood* v. *Camps* (1889), 53 J. P. 612; *Bannister* v. *Sullivan* (1904), 91 L. T. 380. This does not apply to illegitimate children (*R.* v. *Maude* (1842), 2 Dowl. (N. S.) 58). See also title POOR LAW.

(*q*) *Mortimore* v. *Wright*, (1840) 6 M. & W. 482, *per* LORD ABINGER, C.B., at p. 486.

(*r*) *Stone* v. *Carr* (1799), 3 Esp. 1, *per* Lord KENYON, C.J., at p. 2.

(*s*) *Fawkner* v. *Watts* (1742), 1 Atk. 406, 408; *Butler* v. *Butler* (1743), 3 Atk. 58, *per* Lord HARDWICKE, L.C., at p. 60; *Hill* v. *Chapman* (1787), 2 Bro. C. C. 231; *Pulsford* v. *Hunter*, *Jennings* v. *Hunter* (1792), 3 Bro. C. C. 416; *Wellesley* v. *Beaufort* (*Duke*) (1827), 2 Russ. 1, *per* Lord ELDON, L.C., at p. 28; *Culbertson* v. *Wood* (1870), 5 I. R. Eq. 23; and see pp. 91, 92, *ante*.

(*t*) *Stone* v. *Carr* (1798), 3 Esp. 1; *Cooper* v. *Phillips* (1831), 4 C. & P. 581 (where infant was in charge of a servant); *Bazeley* v. *Forder*, *supra* (wife living apart from her husband); but the question of a wife's authority may be left to the jury (*Rawlyns* v. *Vandyke* (1800), 3 Esp. 250, *per* Lord ELDON, L.C., at p. 252). See also *Atkyns* v. *Pearce* (1857), 26 L. J. (C. P.) 252; and see note (*o*), p. 67, *ante*, and p. 116, *post*.

(*a*) *Re Hinde*, *Ex parte Whitbread* (1816), 2 Mer. 99, *per* Lord ELDON, L.C., at p. 102. A similar allowance will be made for the illegitimate children of a lunatic (*Re Jones*, *Ex parte Haycock* (1828), 5 Russ. 154).

(*b*) *Fawkner* v. *Watts*, *supra*, at p. 408; *Clarke* v. *Wright* (1861), 6 H. & N. 849, Ex. Ch., *per* BLACKBURN, J., at p. 859, *per* COCKBURN, C.J., at p. 874. The moral

SECT. 3. Maintenance and Education.

Liability under poor law.

267. Under the poor law the father, and the mother after the death of the father, and also the grandfather (*c*) and grandmother (*d*), if able to do so, are bound to maintain a child who cannot support himself (*e*). Relief given to a wife, or to a child under the age of sixteen, and not being blind or deaf or dumb, is deemed to be given to the husband of the wife, or to the father of the child; and relief given to the child, under that age, of a widow is deemed to be given to the widow (*f*). Where a man marries a woman who has at the time children, whether legitimate or illegitimate, he is liable to maintain them as part of his family until they attain the age of sixteen, or until the death of their mother (*g*).

Liability of married woman.

268. A married woman who has separate property is under the same legal liability as her husband for the maintenance of her children and grandchildren; but the liability does not relieve her husband from his legal liability to maintain her children and grandchildren (*h*).

Maintenance order under poor law.

Where any relative is liable at law to maintain a poor person whose relief would otherwise be chargeable to a poor law union or parish, the guardians of the union or parish can obtain an order upon such relative to maintain the poor person (*i*); and compliance with such order will be enforced as a civil debt recoverable summarily under the Summary Jurisdiction Act, 1879 (*k*).

Education.

269. It is the duty of a parent of a child, including a blind or deaf child, between the ages of five and fourteen to cause the child to receive an efficient elementary education (*l*).

SUB-SECT. 3.—*Liability of Father for Debts.*

Liability of father for debts of child, or for money expended on him.

270. A father is under no liability to pay a debt incurred by an infant child (*m*), or money expended on the child's behalf (*n*), even

obligation extends to illegitimate children (*Clarke* v. *Wright* (1861), 6 H. & N. 849, 859, 874. Ex. Ch.).

(*c*) The liability of a grandfather is irrespective of the ability of the father to maintain the child (*R.* v. *Cornish* (1831), 2 B. & Ad. 498; *Westminster Union Guardians* v. *Buckle* (1897), 61 J. P. 247).

(*d*) A grandmother is not liable while a married woman (*Coleman* v. *Birmingham Overseers* (1881), 6 Q. B. D. 615), except out of her separate property (see *infra*).

(*e*) Poor Relief Act, 1601 (43 Eliz. c. 2), s. 6. See title POOR LAW.

(*f*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4 c. 76), s. 56.

(*g*) *Ibid.*, s. 57; *R.* v. *Clentham Parish* (1710), Foley, Laws Relating to the Poor, p. 39; *R.* v. *St. Botolph's Aldgate* (1711), Foley, Laws relating to the Poor, p. 42.

(*h*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 21. As to the liability of a married woman under the Vagrancy Act, 1824 (5 Geo. 4, c. 83), see *Peters* v. *Cowie* (1877), 2 Q. B. D. 131; and title POOR LAW.

(*i*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 36; see title POOR LAW.

(*k*) 42 & 43 Vict. c. 49; see ss. 6, 35. The liability to provide maintenance is a continuing liability (*Ulverstone Union Guardians* v. *Park* (1889), 53 J. P. 629).

(*l*) See title EDUCATION, Vol. XII., pp. 54 *et seq.* There is no common law obligation; see p. 114, *ante*.

(*m*) *Fluck* v. *Tollemache* (1823), 1 C. & P. 5; *Clements* v. *Williams* (1837), 8 C. & P. 58; *Mortimore* v. *Wright* (1840), 6 M. & W. 482. But if he voluntarily pays such debt and dies insolvent, there is no debt from the child to the father's estate (*Graham* v. *Wickham* (No. 2) (1862), 31 Beav. 478).

(*n*) *Seaborne* v. *Maddy* (1840), 9 C. & P. 497; *Healing* v. *Healing* (1902), 19 T. L. R. 90.

SECT. 3. Maintenance and Education.

in respect of necessaries (*o*), unless he has expressly or impliedly contracted to do so (*p*), or has given authority for the incurring of the debt or the expenditure of the money (*q*). The authority may be implied (*r*), as, for instance, where he knowingly acquiesces in the child being maintained by a stranger (*s*).

SUB-SECT. 4.—*Orders for Maintenance and Education in Matrimonial Causes.*

In matrimonial causes.

271. During a proceeding for obtaining, or in making, or from time to time after making, a final decree of judicial separation, nullity of marriage, or dissolution of marriage, the court may make any order or provision with respect to the maintenance and education of the children of the marriage (*t*).

After a final decree of nullity of marriage or dissolution of marriage the maintenance and education and other benefit of the children of the marriage, as well as the benefit of their parents, may be provided for out of the property settled on the parties to the marriage by any antenuptial or postnuptial settlements (*a*).

After a decree of dissolution of marriage or judicial separation, a settlement of all or any part of the property of a wife in fault may be ordered to be made for the benefit of the children of the marriage, or any of them, either alone or together with their father (*b*).

(*o*) *Urmston* v. *Newcomen* (1836), 4 Ad. & El. 899; *Shelton* v. *Springett* (1851), 11 C. B. 452. But a wife living apart from her husband may bind his credit for necessaries supplied to his infant children of whom custody has been given to her by an order of the court (*Bazeley* v. *Forder* (1868), L. R. 3 Q. B. 559; see also title HUSBAND AND WIFE, Vol. XVI., pp. 427, 578). As to implied authority arising out of moral duty, see p. 114, *ante*.

(*p*) *Blackburn* v. *Mackey* (1823), 1 C. & P. 1; *Andrews* v. *Garrett* (1859), 6 C. B. (N. S.) 262. There is no implied authority where the father allows the son a reasonable sum for expenses (*Crantz* v. *Gill* (1796), 2 Esp. 471). If extravagant clothes are supplied, the father is not liable (*Simpson* v. *Robertson* (1793), 1 Esp. 17). As to a father's possible liability for a son's tort, see *Moon* v. *Towers* (1860), 8 C. B. (N. S.) 611; and as to torts generally, see title TORT.

(*q*) *Rolfe* v. *Abbott* (1833), 6 C. & P. 286. For form of authority by a father to supply goods to an infant son, and of notice by father that his son is an infant, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 555, 556.

(*r*) *Baker* v. *Keen* (1819), 2 Stark. 501; *Earratt* v. *Burghart* (1828), 3 C. & P. 381; *Law* v. *Wilkin* (1837), 6 Ad. & El. 718; which, however, is disapproved in *Mortimore* v. *Wright* (1840), 6 M. & W. 482, *per* Lord ABINGER, C.B., at p. 487.

(*s*) *Hesketh* v. *Gowing* (1804), 5 Esp. 131; *Nichole* v. *Allen* (1827), 3 C. & P. 36; but see as to this case *Mortimore* v. *Wright*, *supra*, *per* Lord ABINGER, C.B., at p. 485; *Bazeley* v. *Forder*, *supra*.

(*t*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 35; Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 4; *Whieldon* v. *Whieldon* (1861), 2 Sw. & Tr. 388; *Milford* v. *Milford* (1869), L. R. 1 P. & D. 715; *Bishop* v. *Bishop*, *Judkins* v. *Judkins*, [1897] P. 138, C. A. An order can be made for maintenance and education until the child attains full age (*Thomasset* v. *Thomasset*, [1894] P. 295, C. A.). The order cannot require that security shall be given for the payment of maintenance (*Hunt* v. *Hunt* (1883), 8 P. D. 161); and see title HUSBAND AND WIFE, Vol. XVI., p. 577.

(*a*) Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5; *Webster* v. *Webster and Mitford* (1862), 3 Sw. & Tr. 106; and see title HUSBAND AND WIFE, Vol. XVI., p. 571.

(*b*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45; *Seatle* v. *Seatle* (1860), 30 L. J. (P. M. & A.) 216; and see title HUSBAND AND WIFE, Vol. XVI., p. 569.

SECT. 4.—*Marriage.*

SECT. 4. Marriage.

Consent.

272. The consent of the father, if living, and after his death, of the mother, if living, is generally requisite for the marriage of an infant child not being a widower or widow (*c*).

Proceedings to annul marriage.

273. A father (*d*) or mother (*e*) can take proceedings to annul the marriage of a child where the child was at the date of the marriage an infant (*f*).

SECT. 5.—*Property.*

SUB-SECT. 1.—*Rights of Parent.*

Right over real estate.

274. A father has, as guardian for nurture or by nature (*g*), no rights over the real estate of his infant child (*h*). But he may have such rights as guardian in socage (*i*) or in gavelkind (*k*), or, if the infant is a copyholder, as guardian by the custom of the manor (*l*); and he may be appointed guardian of the infant's estate by the court (*m*). If he enters on the infant's land, and receives the rents and profits, whether he does so by virtue of any such guardianship or not, he will be deemed to do so as guardian for the infant, and must account accordingly for the rents and profits received by him (*n*). He is not allowed to apply these rents and profits in maintaining and educating the infant (*o*), except under the express sanction of the court (*p*), but his having done so may in a proper case be ratified or condoned by the court (*q*). Similarly, a mother who receives

(*c*) See note (*g*), p. 57, *ante;* and title HUSBAND AND WIFE, Vol. XVI., pp. 296, 297.

(*d*) *Sherwood* v. *Ray* (1837), 1 Moo. P. C. C. 353.

(*e*) *Sherwood* v. *Ray, supra,* at p. 402; *Prowse* v. *Spurway and Bowley* (*falsely called Spurway*) (1876), 24 W. R. 850. But the mother is not entitled after the father's death to continue proceedings for the purpose instituted by him (*Bevan* v. *M'Mahon and Bevan* (*falsely called M'Mahon*) (1859), 2 Sw. & Tr. 58).

(*f*) *Sherwood* v. *Ray, supra* (where the child was adult at the time of the marriage); *Wells* v. *Cottam* (*falsely called Wells*) (1864), 3 Sw. & Tr. 364; *Prowse* v. *Spurway and Bowley* (*falsely called Spurway*) *supra;* and as to nullity suits, see title HUSBAND AND WIFE, Vol. XVI., pp. 499, 537, note (*b*).

(*g*) See pp. 122, 123, *post.*

(*h*) Co. Litt. 88 b, Hargrave's note (12); *R.* v. *Thorp* (1696), Carth. 384; *R.* v. *Sherrington* (*Inhabitants*) (1832), 3 B. & Ad. 714. As to his rights on the death of an infant child, see title DESCENT AND DISTRIBUTION, Vol. XI., p. 22.

(*i*) See pp. 121, 122, *post.*

(*k*) See note (*p*), p. 122, *post.*

(*l*) See p. 122, *post.*

(*m*) See pp. 125 *et seq.*, *post.*

(*n*) 1 Bl. Com. 453; *Morgan* v. *Morgan* (1738), 1 Atk. 489; *Thomas* v. *Thomas* (1855), 2 K. & J. 79, *per* PAGE WOOD, V.-C., at pp. 84, 86. A parent stands in a fiduciary position towards a child (see p. 118, *post*).

(*o*) See pp. 91, 114, *ante.*

(*p*) See pp. 86, 91, 92, *ante.*

(*q*) *Thomas* v. *Thomas, supra,* at p. 84; *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, C. A., *per* KNIGHT BRUCE, L.J., at p. 140; and see p. 92, *ante.* Where a father and adult daughter were jointly entitled to real estate, and the father received the entire rents, and kept no accounts with the daughter, but she lived with him and was maintained and supplied with money by him, it was held that the common establishment had been maintained out of the entire rents (*Smith* v. *Smith, Trinder* v. *Smith* (1857), 23 Beav. 554).

SECT. 5. Property.

the rents and profits of the estate of her infant child, does so as bailiff or agent for him (*r*). An infant heir can obtain an injunction restraining his father, when tenant by the curtesy (*s*), from committing waste (*t*).

Rights over personal estate.

275. Unless expressly empowered so to do, a father cannot give a valid receipt or discharge for property of his infant child (*a*). If he receives it, he does so as guardian or agent for the infant (*b*); but while infant children live with and are maintained by their father, he is entitled to the earnings of their labour (*c*).

SUB-SECT. 2.—*Dealings between Parent and Child.*

Relation between parent and child.

276. A parent stands in a fiduciary relation towards a child (*d*), and has certain moral obligations to fulfil towards him (*e*). Consequently any question as to whether a transaction constitutes a gift by a parent to his child is construed favourably towards the child, and any question whether a transaction is to be upheld as a gift by a child to his parent, or is to be set aside as obtained by undue influence, or for any other reason, is construed unfavourably as against the parent (*f*).

Purchase in name of child.

277. Where a father purchases either real or personal estate in the name of a child alone, or in the joint names of the child and of himself or a stranger, there is no resulting trust for the father (*g*); but the father is presumed to have intended to advance the child (*h*),

(*r*) *Wall* v. *Stanwick* (1887), 34 Ch. D. 763.

(*s*) See title REAL PROPERTY AND CHATTELS REAL.

(*t*) *Roberts* v. *Roberts* (1657), Hard. 96.

(*a*) *Dagley* v. *Tolferry* (1715), 1 P. Wms. 285; *Philips* v. *Paget* (1740), 2 Atk. 80; see p. 76, *ante*. Money belonging to an infant will not be payable to his father even though the father is by the law of his domicil entitled to receive it (*Re Hellmann's Will* (1866), L. R. 2 Eq. 363; *Re Chatard's Settlement*, [1899] 1 Ch. 712). As to the effect of domicil on the rights of a parent, see title CONFLICT OF LAWS, Vol. VI., p. 280.

(*b*) *Dagley* v. *Tolferry*, *supra*; *Gambier* v. *Gambier* (1835), 7 Sim. 263. A mother who is also a guardian can give a good receipt for the infant's income (*Re Long, Lovegrove* v. *Long*, [1901] W. N. 166). As to where questions of domicil and foreign law arise, see title CONFLICT OF LAWS, Vol. VI., p. 280. As to the rights of the father or mother on the death of an infant child, see title DESCENT AND DISTRIBUTION, Vol. XI., p. 22.

(*c*) 1 Bl. Com. 453. The same rule may apply to adult children (*ibid.*; *Ex parte Macklin* (1755), 2 Ves. Sen. 675). But an adult child so situated may have a title to a portion of his own earnings (*Ex parte Macklin*, *supra*).

(*d*) *Plowright* v. *Lambert* (1885), 52 L. T. 646, *per* FIELD, J., at p. 652.

(*e*) See p. 114, *ante*.

(*f*) See p. 78, *ante*; and titles EQUITY, Vol. XIII., p. 18; FAMILY ARRANGEMENTS, Vol. XIV., pp. 543, 549 *et seq.*; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 107, 108 *et seq.*; GIFTS, Vol. XV., pp. 402, 420.

(*g*) See title EQUITY, Vol. XIII., p. 155; GIFTS, Vol. XV., pp. 415, 417; TRUSTS AND TRUSTEES.

(*h*) *Grey* (*Lord*) v. *Grey* (*Lady*) (1677), 2 Swan. Appendix, 594; *Dyer* v. *Dyer* (1788), 2 Cox, Eq. Cas. 92; *Finch* v. *Finch* (1808), 15 Ves. 43; *Murless* v. *Franklin* (1818), 1 Swan. 13; *Crabb* v. *Crabb* (1834), 1 My. & K. 511; *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447; *Christy* v. *Courtenay* (1849), 13 Beav. 96; *Williams* v. *Williams* (1863), 32 Beav. 370; *Hepworth* v. *Hepworth* (1870), L. R. 11 Eq. 10; *Bennet* v. *Bennet* (1879), 10 Ch. D. 474, *per* JESSEL, M.R., at pp. 476, 477.

Presumption of advancement.

especially where he is an infant (*i*). The presumption does not exist where the purchase is made by a mother (*k*), but slighter evidence is sufficient to prove an intention on her part to advance the child than would be required in case of a purchase by a stranger (*l*), and it arises where the purchase is made in the name of a person towards whom the purchaser has put himself *in loco parentis* (*m*). The presumption may be rebutted by evidence of a contrary intention (*n*), but it must be evidence of statements or facts contemporaneous with the transaction (*o*), and evidence will only be admitted of subsequent statements or facts, if they are against the interest of the party making the statement or being concerned in the facts (*p*). The presumption is not rebutted by the fact that the child has been already provided for (*q*); nor by the receipt by the father of the rents or income of the purchased property (*r*), especially where the child is an infant, so that the receipt may be referred to the father's position as guardian (*s*). There must, however, be an intention to confer a present benefit; and a purchase in the name of a child with a view to an ultimate benefit to him will not constitute an advancement (*t*).

Interest on portions.

278. Where under a settlement of real estate by a father, or person *in loco parentis* (*a*), a portion is given to a child not otherwise provided for, which will not be raiseable if he dies before attaining full age, interest on the portion may nevertheless be allowed to the child for maintenance during infancy (*b*).

(*i*) *Lamplugh* v. *Lamplugh* (1709), 1 P. Wms. 111, 112.

(*k*) *Bennet* v. *Bennet* (1879), 10 Ch. D. 474; and see title GIFTS, Vol. XV., pp. 415, 416.

(*l*) *Garrett* v. *Wilkinson* (1848), 2 De G. & Sm. 244, 246; *Sayre* v. *Hughes* (1868), L. R. 5 Eq. 376; *Batstone* v. *Salter* (1874), L. R. 19 Eq. 250; *Bennet* v. *Bennet, supra, per* JESSEL, M.R., at pp. 479, 480.

(*m*) *Ebrand* v. *Dancer* (1680), 2 Cas. in Ch. 26; *Currant* v. *Jago* (1844), 1 Coll. 261; *Bennet* v. *Bennet, supra*, at pp. 476, 477; *Standing* v. *Bowring* (1884), 27 Ch. D. 341. As to a person putting himself *in loco parentis* towards a child, see note (*k*), p. 111, *ante*.

(*n*) *Pole* v. *Pole* (1748), 1 Ves. Sen. 76; *Bone* v. *Pollard* (1857), 24 Beav. 283; *Tucker* v. *Burrow* (1865), 2 Hem. & M. 515; *Stock* v. *McAvoy* (1872), L. R. 15 Eq. 55; *Crabb* v. *Crabb* (1834), 1 My. & K. 511; and see title GIFTS, Vol. XV., p. 416.

(*o*) *Murless* v. *Franklin* (1818), 1 Swan. 13; *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447; *Christy* v. *Courtenay* (1849), 13 Beav. 96; *Dumper* v. *Dumper* (1862), 3 Giff. 583; *Williams* v. *Williams* (1863), 32 Beav. 370.

(*p*) *Redington* v. *Redington* (1794), 3 Ridg. Parl. Rep. 106, 194, 195; *Sidmouth* v. *Sidmouth, supra*, at p. 455; *Stock* v. *McAvoy, supra, per* WICKENS, V.-C., at pp. 58, 59; and see title EVIDENCE, Vol. XIII., p 463.

(*q*) *Dyer* v. *Dyer* (1788), 2 Cox, Eq. Cas. 92; *Hepworth* v. *Hepworth* (1870), L. R. 11 Eq. 10.

(*r*) *Grey* (*Lord*) v. *Grey* (*Lady*) (1677), 2 Swan. Appendix, 594, 599; *Sidmouth* v. *Sidmouth, supra*, at pp. 456, 457; *Batstone* v. *Salter, supra*.

(*s*) *Mumma* v. *Mumma* (1687), 2 Vern. 19; *Lamplugh* v. *Lamplugh, supra*, at p. 113; *Loyd* v. *Read* (1720), 1 P. Wms. 607, *per* Lord PARKER, L.C., at p. 608; *Taylor* v. *Taylor* (1737), 1 Atk. 386; *Stileman* v. *Ashdown* (1742), 2 Atk. 477, *per* Lord HARDWICKE, L.C., at p. 480; *Alleyne* v. *Alleyne* (1845), 2 Jo. & Lat. 544, 555, 556; *Christy* v. *Courtenay, supra*.

(*t*) *Forrest* v. *Forrest* (1865), 13 W. R. 380, *per* STUART, V.-C., at p. 381.

(*a*) See note (*k*), p. 111, *ante*.

(*b*) *Staniforth* v. *Staniforth* (1704), 2 Vern. 460; *Incledon* v. *Northcote* (1747), 3 Atk. 430, 438; *Brown* v. *Temperley* (1827), 3 Russ. 263; *Re Greaves' Settled*

SECT. 5. **Property.**

Interest on legacies.

279. Where an infant is interested in a legacy under the will of a father, or of a person *in loco parentis* (*c*), who is under the moral obligation of maintaining him, he is entitled for the purposes of his maintenance to interest or income in respect of it from the date of the testator's death (*d*), instead of from the expiration of one year from that date (*e*), notwithstanding that the conditions as to the vesting or payment of the legacy are such that, if he were in a different relation to the testator, he would not be entitled to the income until attaining full age, or the happening of some other event upon which the legacy was to become vested or payable (*f*). The rule does not apply where the testator has provided another fund for the maintenance of the legatee (*g*).

SECT. 6.—*Illegitimate Children.*

Reference to children generally means legitimate children only.

Rights and duties of putative father and of mother.

280. In the absence of a contrary intention either expressed or deducible by necessary inference, all provisions respecting "children," contained in any laws or instruments having a legal operation, refer exclusively to legitimate children (*h*). The rights and duties of the putative father and the mother with respect to illegitimate children differ materially from those of a father and mother with respect to legitimate children (*i*).

Estates, Jones v. Greaves, [1900] 2 Ch. 683. For a clause in a will extending this provision, see Encyclopædia of Forms and Precedents, Vol. XV., p. 517.

(*c*) See note (*k*), p. 111, *ante*.

(*d*) *Harvey* v. *Harvey* (1722), 2 P. Wms. 21; *Haughton* v. *Harrison* (1742), 2 Atk. 329, *per* Lord HARDWICKE, L.C., at p. 330; *Beckford* v. *Tobin* (1749), 1 Ves. Sen. 308, *per* Lord HARDWICKE, L.C., at p. 310; *Crickett* v. *Dolby* (1795), 3 Ves. 10, *per* ARDEN, M.R., at p. 13; *Hill* v. *Hill* (1814), 3 Ves. & B. 183; *Pett* v. *Fellows* (1818), 1 Swan. 561. A posthumous child is only entitled to interest from his birth (*Rawlins* v. *Rawlins* (1796), 2 Cox, Eq. Cas. 425).

(*e*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 273. As to the rule of law respecting double portions to children, and legacies generally, see title WILLS.

(*f*) *Beckford* v. *Tobin*, *supra*, at p. 310; *Cavendish* v. *Mercer* (1776), cited in *Greenwell* v. *Greenwell* (1800), 5 Ves. 194, at p. 195, n. (1); *Lomax* v. *Lomax* (1805), 11 Ves. 48; *Errington* v. *Chapman* (1806), 12 Ves. 20; *Re George* (*an Infant*) (1877), 5 Ch. D. 837, C. A., *per* JAMES, L.J., at p. 843. Where the contingency extends beyond attaining the age of twenty-one, the consent of the remainderman may be required (*Fendall* v. *Nash* (1779), cited in *Greenwell* v. *Greenwell*, *supra*, at p. 197, n. (r); *Fairman* v. *Green* (1804), 10 Ves. 45; *Cannings* v. *Flower* (1835), 7 Sim. 523); or no interest may be payable (see *Re Abrahams*, *Abrahams* v. *Bendon*, [1911] 1 Ch. 108).

(*g*) *Beckford* v. *Tobin*, *supra*, at p. 310; *Donovan* v. *Needham* (1846), 9 Beav. 164; *Re Rouse's Estate* (1852), 9 Hare, 649, *per* TURNER, V.-C., at p. 653; *Re George* (*an Infant*), *supra*, at p. 843; *Re Moody*, *Woodroffe* v. *Moody*, [1895] 1 Ch. 101, 106 *et seq.*; *Re Abrahams*, *Abrahams* v. *Bendon*, *supra*; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 272, 273. Where a father bequeathed a legacy to his daughter in case she should attain full age, and made no provision for her maintenance between marriage under age and attainment of full age, interest was allowed on the legacy between the time of her marrying under age and attaining full age (*Chambers* v. *Goldwin* (1805), 11 Ves. 1).

(*h*) *R.* v. *Wyke* (*Inhabitants*) (1746), Burr. S. C. 264, 265; *R.* v. *Maude* (1842), 6 Jur. 646; *R.* v. *Totley* (*Inhabitants*) (1845), 7 Q. B. 596, *per* Lord DENMAN, C.J., at p. 598; *R.* v. *Birmingham* (*Inhabitants*) (1846), 8 Q. B. 410, *per* Lord DENMAN, C.J., at p. 426; *Dickinson* v. *North Eastern Rail. Co.* (1863), 2 H. & C. 735, *per* POLLOCK, C.B., at p. 736.

(*i*) See titles BASTARDY, Vol. II., pp. 440—454; CONTRACT, Vol. VII., p. 396

Part VII.—Guardianship of Person and Estate.

SECT. 1.—*Title.*

SECT. 1. Title.

SUB-SECT. 1.—*In General.*

Guardian and ward.

281. The disabilities of an infant and his legal incapacity to manage his own affairs render it necessary that for the protection of his interests and the management of his property he should have a guardian of his person and property, to whom he stands in the relation of ward (*k*). A person may be the guardian of an infant either (1) in socage; (2) by nature in the case of an heir-apparent; (3) by custom; (4) for nurture; (5) naturally, or by parental right; (6) by parental appointment, or (7) by appointment by a court of competent jurisdiction (*l*).

SUB-SECT. 2.—*In Socage.*

Guardianship in socage.

282. Guardianship in socage exists only where the infant is under the age of fourteen and has by descent the legal estate in land held in socage tenure (*m*). In that case it is not confined to the land which he holds in socage, but extends to his other land and property

The rules of law as to the advancement of children (see pp. 118, 119, *ante*) and double portions of children (see title WILLS) do not apply to illegitimate children unless the father has put himself *in loco parentis* towards them (*Smith* v. *Strong* (1794), 4 Bro. C. C. 493; *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140, *per* Lord ELDON, L.C., at pp. 147, 148, 152; *Wetherby* v. *Dixon* (1815), 19 Ves. 407; *Re Lawes, Lawes* v. *Lawes* (1881), 20 Ch. D. 81, C. A.). As to the extension of a parent's moral obligation in respect of maintenance and education of illegitimate children, see note (*b*), p. 114, *ante;* and *R.* v. *Maude* (1842), 2 Dowl. (N. S.) 58.

(*k*) Termes de la Ley, *sub voce* "Gardeine"; 1 Bl. Com. 460 *et seq.*; *Re Salisbury* (*Marquis*) *and Ecclesiastical Commissioners* (1876), 2 Ch. D. 29, C. A., *per* MELLISH, L.J., at p. 35. As to wards of court, see pp. 146 *et seq.*, *post*. The relation of guardian and ward is strictly that of trustee and *cestui que trust* (*Beaufort* (*Duke*) v. *Berty* (1721), 1 P. Wms. 703, *per* Lord MACCLESFIELD, L.C., at p. 705; *Mathew* v. *Brise* (1851), 14 Beav. 341, *per* ROMILLY, M.R., at p. 345). A guardian stands in a fiduciary relation towards his ward (*Plowright* v. *Lambert* (1885), 52 L. T. 646, *per* FIELD, J., at p. 652). As to transactions between guardians and wards, see *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547; *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, C. A.; *Motz* v. *Moreau* (1861), 13 Moo. P. C. C. 376; and titles EQUITY, Vol. XIII., p. 18; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 108. As to the guardianship of illegitimate children, see title BASTARDY, Vol. II., p. 440. As to guardians *ad litem*, see pp. 140 *et seq.*, *post*. As to the effect of foreign domicil, see title CONFLICT OF LAWS, Vol. VI., p. 281.

(*l*) Co. Litt. 88 b, Hargrave's notes (2) to (16); 1 Bl. Com. 460 *et seq.* As to the powers of the county courts, see title COUNTY COURTS, Vol. VIII., p. 654.

(*m*) Co. Litt. 88 a, b, Hargrave's note (13); 2 Bl. Com. 87, 88; Com. Dig., tit. Gardian (B.); *Quadring* v. *Downs* (1677), 2 Mod. Rep. 176; *R.* v. *Toddington* (*Inhabitants*) (1818), 1 B. & Ald. 560; *R.* v. *Sherrington* (*Inhabitants*) (1832), 3 B. & Ad. 714, *per* Lord TENTERDEN, C.J., at pp. 715, 716. As to socage tenure, see 2 Bl. Com. 79 *et seq.*; and title REAL PROPERTY AND CHATTELS REAL. All tenures are now socage (Com. Dig., tit. Gardian (B. 1); *Bedell* v. *Constable* (1668), Vaugh. 177, 183).

SECT. 1. Title.

and to his person (*n*). The guardianship belongs to such one of the infant's nearest in blood as cannot inherit the socage land by descent, without any distinction between the whole and half blood; and in case of his death while the infant is still under fourteen, it devolves upon the next in blood who cannot so inherit (*o*). The guardianship continues only until the age of fourteen (*p*); after its termination the infant can choose for himself a guardian during the remainder of his minority (*q*).

SUB-SECT. 3.—*By Nature.*

Guardianship by nature.

283. Guardianship by nature, in its original and strict sense (*r*), is that of a father over his infant heir-apparent of either sex (*s*). It lasts until the infant attains full age, but is exercisable only over the person of the infant (*t*).

SUB-SECT. 4.—*By Custom.*

Guardianship by custom.

284. In many manors special rights of guardianship of infant copyholders exist by custom with reference to their copyhold lands (*a*). In some cities and boroughs there have been special customs as to the guardianship of an infant whose father is dead (*b*). In the city of London the mayor and aldermen, in their Court of Orphans, have, as guardians by custom, the right to the custody of the person and estate of an infant, whose father was a freeman of the city and

(*n*) Co. Litt. 87 b, 88 b, Hargrave's note (13). It is superseded by the appointment of a testamentary guardian (*ibid.*; stat. (1660), 12 Car. 2, c. 24, s. 8), as to which see p. 123, *post*.

(*o*) Co. Litt. 87 b, 88 a, b, Hargrave's note (13); 1 Bl. Com. 461; 2 Bl. Com. 87, 88. If there are two or more nearest of kin in equal degree, who cannot inherit, he who first gains possession of the heir acquires the guardianship, except where they are brothers or sisters, in which case the eldest has the right to it. If the infant derives socage lands by descent both *ex parte paternâ* and *ex parte maternâ*, so that it may be impossible to find next of kin incapable of inheriting from him, the next of kin on either side who first gets possession of the infant is entitled to the custody of his person, and the custody of the lands coming *ex parte paternâ* goes to the maternal heir, and that of the lands coming *ex parte maternâ* to the paternal heir (Co. Litt. 88 a, 88 b, Hargrave's note (13)). A guardian in socage cannot transfer his guardianship (*Bedell* v. *Constable* (1668), Vaugh. 177, 181).

(*p*) Co. Litt. 88 a, b; 2 Bl. Com. 88; *Thomas* v. *Thomas* (1855), 2 K. & J. 79, *per* PAGE WOOD, V.-C., at p. 84. In the case of gavelkind lands the guardianship continues until the infant attains the age of fifteen (Robinson, Customs of Gavelkind (ed. 1858), ch. 3, pp. 115, 116).

(*q*) See p. 58, *ante*.

(*r*) As to natural guardianship in its wider sense, see *infra*.

(*s*) Co. Litt. 84 a, b; Com. Dig., tit. Gardian (C.); *Ratcliff's Case* (1592), 3 Co. Rep. 37 a, 37 b *et seq.*

(*t*) Com. Dig., tit. Gardian (C.); *R.* v. *Thorp* (1696), Carth. 384, *per* HOLT, C.J., at p. 386.

(*a*) See title COPYHOLDS, Vol. VIII., p. 80. If there is another guardian, whether in socage or testamentary, his right to the custody of the infant will have priority over the right of the customary guardian (Watkins, Treatise on Copyholds, Vol. II., p. 105).

(*b*) Stat. (1660) 12 Car. 2, c. 24, which authorised fathers to appoint testamentary guardians (see pp. 123 *et seq.*, *post*), provided that nothing therein contained should extend to alter or prejudice the custom of the city of London, or of any other city or town corporate, or of the town of Berwick-on-Tweed, concerning orphans (*ibid.*, s. 9).

died within its limits. This guardianship continues in the case of a male infant until the age of twenty-one, and in the case of a female infant until the age of eighteen or marriage under that age (*c*).

SUB-SECT. 5.—*For Nurture.*

Guardianship by nurture.

285. A father, and after his death a mother, has the guardianship for nurture of an infant child up to the age of fourteen (*d*).

SUB-SECT. 6.—*By Parental Right.*

Guardianship by parental right.

286. A father (*e*), and after his death a mother (*f*), has by parental right the guardianship of the person of an infant child up to the age of twenty-one (*g*), as his natural guardian in the wider sense of the term (*h*).

SUB-SECT. 7.—*By Parental Appointment.*

Testamentary appointment of guardians under statute.

287. Both a father and mother have power, if under age by deed, and if of full age by deed or will, to appoint persons to act as guardians of an infant child, in the case of a father, after his death, and, in the case of a mother, after the death of herself and the father, if the child is then an infant and unmarried (*i*). Where the appointment is made by deed, it is of a testamentary nature (*k*), and is revocable by a subsequent will making a different appointment (*l*);

(*c*) Bac. Abr., tit. Customs of London (B.), 7th ed., pp. 582, 583; Com. Dig., tit. Gardian (G.); *Wilkinson* v. *Boulton* (1665), 1 Lev. 162; *sub nom. Wilkinson* v. *Bolton* (1665), 1 Sid. 250; *Frederick* v. *Frederick* (1721), 1 P. Wms. 710.

(*d*) Co. Litt. 88 b, Hargrave's note (13); Com. Dig., tit. Gardian (D.); 1 Bl. Com. 461; *Hasfield* (*Parish*) v. *Furley* (*Parish*) (1740), 2 Stra. 1131; *R.* v *Clarke* (1857), 7 E. & B. 186, 192; but see *Re Race* (*Alicia*), *an Infant* (1857), cited in *Gurney* v. *Gurney* (1863), 1 Hem. & M. 413, 420, n. (a); *Hyde* v. *Hyde* (1859), 29 L. J. (P. M. & A.) 150.

(*e*) *Ratcliff's Case* (1592), 3 Co. Rep. 37 a, 38 b; *R.* v. *Thorpe* (1696), Carth. 384; *Re Salisbury* (*Marquis*) *and Ecclesiastical Commissioners* (1876), 2 Ch. D. 29, C. A., *per* JAMES, L.J., at pp. 31, 32, *per* MELLISH, L.J., at p. 36; *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles* (1883), 24 Ch. D. 317, C. A., *per* BRETT, M.R., at pp. 327, 328.

(*f*) *Ratcliff's Case*, *supra*, at p. 38 b; *Mellish* v. *De Costa* (1737), 2 Atk. 14; *Re Bedford Charity* (*Masters etc.*), *Villareal* v. *Mellish* (1738), 2 Swan. 533, 536; *Mendes* v. *Mendes* (1748), 3 Atk. 619, *per* Lord HARDWICKE, L.C., at p. 624; Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 2. See p. 108, *ante*, and p. 125, *post*.

(*g*) Co. Litt. 88 b, Hargrave's note (12); *Mendes* v. *Mendes*, *supra*, at p. 624.

(*h*) Co. Litt. 88 b, Hargrave's note (12); Bac. Abr., tit. Guardian (A.) 1, 7th ed., p. 94; *Mendes* v. *Mendes*, *supra*, at p. 624.

(*i*) Stat. (1660) 12 Car. 2, c. 24 s. 8; Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 3, 4; Bac. Abr., tit. Guardian (A.) 3, 7th ed., pp. 95 *et seq.* An infant parent cannot make the appointment by will except in the case of a soldier on actual service, or a seaman at sea (Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 7, 11; see pp. 49, 57, 104, *ante*). As to appointments by deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 365, 399. For form of appointment by deed, see Encyclopædia of Forms and Precedents, Vol. VI., p. 564, Vol. XVII., p. vii., and by will, *ibid.*, Vol. XV., pp. 400, 560, 561; and see title WILLS. A father has no power to appoint a guardian of his illegitimate child (*Sleeman* v. *Wilson* (1871), L. R. 13 Eq. 36). As to an appointment by a grandfather, see *Blake* v. *Leigh* (1756), Amb. 306.

(*k*) *Ex parte Ilchester* (*Earl*) (1803), 7 Ves. 348, *per* Lord ELDON, L.C., at p. 367. But it need not be executed with the same formalities as a will (*De Bathe* v. *Fingal* (*Lord*) (1809), 16 Ves. 167).

(*l*) *Shaftsbury* (*Earl*) v. *Hannam* (1677), Cas. *temp.* Finch 323. The appointment is not revoked by a testamentary instrument leaving the care, charge, and

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but it is not admissible to probate (*m*). The intended guardian may attest the deed (*n*). No special words are necessary in making the appointment (*o*), but it is not sufficient to appoint a person guardian of the estate of the child (*p*).

Of what children, and for what period.

The appointment may be made in respect of every child born, or (in the case of an appointment by a father) *en ventre sa mère*, at the death of the appointor, whether born or conceived before or after the date of the appointment (*q*), and, where the appointment is made by deed, whether by a then existing or subsequent marriage (*r*). The power extends to every child of the appointor who at his death is an infant and unmarried (*s*). The guardianship may be made to continue during infancy or during any less period (*t*). Where it is not made determinable on marriage, it will not terminate on the marriage of a child after the death of the appointor, but before attaining full age (*a*).

Survival of guardianship.

Several persons may be appointed; and in that case, if one or more disclaim or die, the guardian or guardians who accept the position or survive can act (*b*). The position is not assignable (*c*); but the instrument containing the appointment may authorise a surviving guardian to appoint a successor to a guardian who may happen to die (*d*). A guardian having accepted the office cannot resign at will (*e*), but may disclaim before acceptance (*f*).

education of the children to another person (*Hare* v. *Hare* (1843), 5 Beav. 629). Where persons have been appointed trustees and guardians, the revocation of their appointment as trustees does not affect their guardianship (*Re Park* (1844), 14 Sim. 89).

(*m*) *Chester's* (*Lady*) *Case* (1672), 1 Vent. 207; *Gilliat* v. *Gilliat and Hatfield* (1820), 3 Phillim. 222; *In the Goods of Morton* (1864), 33 L. J. (P. M. & A.) 87. And see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 158.

(*n*) *Morgan* v. *Hatchell* (1854), 19 Beav. 86. It is doubtful whether any witness to the deed is necessary (*ibid.*, *per* ROMILLY, M.R., at p. 87).

(*o*) *Teynham* (*Lady*) v. *Lennard* (1724), 4 Bro. Parl. Cas. 302; *Bridges* v. *Hales* (1729), Mos. 108; *Mendes* v. *Mendes* (1748), 3 Atk. 619, *per* Lord HARDWICKE, L.C., at p. 624; *Miller* v. *Harris* (1845), 14 Sim. 540. A mere commendation of the infant to the care of a person has been held insufficient (*Edwards* v. *Wise* (1740), Barn. (CH.) 139).

(*p*) *Re Norbury* (*Lord*) (1875), 9 I. R. Eq. 134. A devise of land to a person in trust for the maintenance and education of an infant child does not create a testamentary guardianship (*Bedell* v. *Constable* (1668), Vaugh. 177, 184).

(*q*) Stat. (1660) 12 Car. 2, c. 24, s. 8.

(*r*) Bac. Abr., tit. Guardian (A.) 3, 7th ed., p. 97. A will is revoked by a subsequent marriage (Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 18).

(*s*) Stat. (1660) 12 Car. 2, c. 24, s. 8.

(*t*) *I bid.*

(*a*) Bac. Abr., tit. Guardian (A.) 3, 7th ed., p. 97; *Eyre* v. *Shaftsbury* (*Countess*) (1723), 2 P. Wms. 102, 107; *Roach* v. *Garvan* (1748), 1 Ves. Sen. 157, 159. As to infants of the female sex, see *Mendes* v. *Mendes* (1748), 1 Ves. Sen. 89, 91; *Roach* v. *Garvan* (1748), Belt's Sup. 86, 87; *Re Sampson and Wall, Infants* (1884), 25 Ch. D. 482, C. A., *per* Lord SELBORNE, L.C., at p. 491.

(*b*) *Eyre* v. *Shaftsbury* (*Countess*), *supra*.

(*c*) *Bedell* v. *Constable*, *supra*, at p. 179; *Mellish* v. *De Costa* (1737), 2 Atk. 14; *Re Bedford Charity* (*Masters etc.*), *Villareal* v. *Mellish* (1738), 2 Swan. 533, 536.

(*d*) *In the Goods of Parnell* (1872), L. R. 2 P. & D. 379.

(*e*) *Spencer* v. *Chesterfield* (*Earl*) (1752), Amb. 146, *per* Lord HARDWICKE, L.C.; *Re Grays, Minors* (1891), 27 L. R. Ir. 609.

(*f*) *Ex parte Champney* (1762), 1 Dick. 350; *O'Keefe* v. *Casey* (1803), 1 Sch. & Lef. 106.

288. The appointment of testamentary guardians supersedes all rights of guardianship in socage or otherwise (*g*).

Paramount authority of testamentary guardian.

289. Where a father appoints guardians and the mother survives him, she is joint guardian with them during her life (*h*). Where he appoints none, or those appointed by him die or refuse to act, the mother is sole guardian, but the court having jurisdiction in the matter (*i*) may, if it thinks fit, from time to time appoint guardians to act jointly with her (*j*).

Guardianship during life of mother.

Powers of mother to appoint guardian.

290. The mother may, by deed or will, provisionally nominate persons to act as guardians of an infant child after her death jointly with the father (*k*), and the court having jurisdiction in the matter (*l*), upon being satisfied that the father is for any reason unfit to be the sole guardian of the child, may confirm their appointment or make such other order in respect of the guardianship as it thinks fit (*m*).

Appointment by both parents.

291. Where each of the parents appoints guardians, the guardians appointed by each act as joint guardians after the death of both parents (*n*).

Powers of court to remove guardians.

292. The High Court of Justice, on being satisfied that it is for the welfare of the infant, may remove the mother or any testamentary guardian from the office of guardian, and may also, if the welfare of the infant appears so to require, appoint another guardian in place of the guardian so removed (*o*).

SUB-SECT. 8.—*By Appointment of the Court.*

Appointment of guardians by court.

293. The Chancery Division of the High Court of Justice in the exercise of its general jurisdiction over infants (*p*), may, if it is for the infant's benefit so to do (*q*), appoint a guardian either where

(*g*) Stat. (1660) 12 Car. 2, c. 24, s. 8.

(*h*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 2.

(*i*) The Act gives jurisdiction to the High Court of Justice or the county court of the district in which the respondent or any of the respondents to an application in the matter reside (*ibid.*, s. 9). See title COUNTY COURTS, Vol. VIII., p. 654.

(*j*) *Ibid.*, s. 2.

(*k*) *Ibid.*, s. 3.

(*l*) *Ibid.*, s. 9. See note (*i*), *supra*.

(*m*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 3 (2), 4; *Re G. (an Infant)*, [1892] 1 Ch. 292. The court may altogether displace the father (*Re G. (an Infant)*, *supra*). See form of provisional appointment, Encyclopædia of Forms and Precedents, Vol. VI., p. 565.

(*n*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 3 (1).

(*o*) *Ibid.*, s. 6; *Re Read, an Infant* (1889), 5 T. L. R. 615; *Re McGrath (Infants)*, [1893] 1 Ch. 143, 147, C. A.; *Walker* v. *Laxton* (1894), 70 L. T. 690. The court will not remove a testamentary guardian only because he is resident abroad (*Re Lewis, a Minor* (1820), 2 Mol. 485; *Re Two Infant Children, Ex parte Nickells* (1891), 7 T. L. R. 498). See also *Dillon* v. *Mount-Cashell (Lady)* (1728), 4 Bro. Parl. Cas. 306; *Smith* v. *Bate* (1784), 2 Dick. 631; *Re Lemons* (1887), 19 L. R. Ir. 575.

(*p*) See p. 47, *ante*. The Chancery Court of the County Palantine of Lancaster has jurisdiction to appoint guardians of infants resident in the county (*Re Alison's Trusts, Re Johnsons, Infants* (1878), 8 Ch. D. 1, C. A.).

(*q*) *Johnstone* v. *Beattie* (1843), 10 Cl. & Fin. 42, H. L., *per* Lord CAMPBELL, at p. 122.

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the infant has no guardian (*r*), or where he has testamentary guardians, or even if the infant's father is living (*s*), and can also, in the interests of the infant, remove an existing guardian and appoint another (*t*). The power extends to the case of an infant who is not previously a ward of court and has no property (*u*), and can be exercised in the case of an infant British subject who was born and is residing abroad (*a*), or who is residing in this country but has no property except abroad (*b*). Where an infant has a foreign guardian or a guardian residing out of the jurisdiction, the court will not interfere with him (*c*), but, if circumstances so require, will appoint either him (*d*) or some other person as guardian of the infant in this country (*e*). The court can appoint a guardian of an infant who is a foreign subject, if he is residing in this country (*f*), even if he have foreign guardians (*g*), but will not do so if he is residing abroad (*h*). The appointment by the court of a guardian of an infant who has no guardian constitutes the infant a ward of court (*i*).

Selection of guardian.

294. In appointing a guardian, the court will pay attention to the wishes of the father or mother of the infant, where they have been expressed without the actual appointment of a guardian (*k*),

(*r*) 3 Bl. Com. 427; Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 6, 13; *May* v. *May* (1776), 2 Dick. 527; *Ex parte Salter* (1792), 3 Bro. C. C. 500; *Ex parte Wheeler* (1809), 16 Ves. 266; *Re Woolscombe, an Infant* (1816), 1 Madd. 213; *Ex parte Janion* (1820), 1 Jac. & W. 395; *Re Kaye* (1866), 1 Ch. App. 387; *Re McGrath (Infants)*, [1893] 1 Ch. 143, C. A. An application for the exercise of the power is made by summons in chambers (R. S. C., Ord. 55, r. 2 (12) (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 203)).

(*s*) *Johnstone* v. *Beattie* (1843), 10 Cl. & Fin. 42, H. L., *per* Lord CAMPBELL, at p. 120.

(*t*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 6, 13; *Re M'Cullochs, Minors* (1844), 6 I. Eq. R. 393, 396; *Re McGrath (Infants)*, *supra*. Where the circumstances so require, the court will appoint a person to act as guardian in the lifetime of the father (*Ex parte Mountfort* (1809), 15 Ves. 445; *Wellesley* v. *Wellesley* (1828), 2 Bli. (N. S.) 124, H. L.); but the appointment will not be made as a matter of course (*Re Lyons (an Infant)* (1869), 22 L. T. 770).

(*u*) *Re Woolscombe, an Infant, supra; Re McGrath (Infants) supra*, at p. 147.

(*a*) *Hope* v. *Hope* (1854), 4 De G. M. & G. 328, 345, 346; *Re Willoughby (an Infant)* (1885), 30 Ch. D. 324, C. A.

(*b*) *Johnstone* v. *Beattie, supra; Re Pavitt*, [1907] 1 I. R. 234.

(*c*) *De Weever* v. *Rochport* (1843), 6 Beav. 391; *Dawson* v. *Jay* (1854), 3 De G. M. & G. 764; *Nugent* v. *Vetzera* (1866), L. R. 2 Eq. 704; *Re Savini (Gori)*, *Savini* v. *Lonsada*, [1870] W. N. 60; and see title CONFLICT OF LAWS, Vol. VI., p. 281.

(*d*) *Re Levinge* (1797), cited in *De Weever* v. *Rochport, supra*, at p. 392, n. (b); *Re Daly* (1798), cited in *De Weever* v. *Rochport, supra*, at p. 393, n. (b); *Daniel* v. *Newton* (1845), 8 Beav. 485.

(*e*) *Re Savini (Gori)*, *Savini* v. *Lonsada, supra*.

(*f*) *Nugent* v. *Vetzera, supra, per* PAGE WOOD, V.-C., at p. 713.

(*g*) *Johnstone* v. *Beattie, supra, per* Lord LANGDALE, at p. 145; *Stuart* v. *Bute (Marquis)*, *Stuart* v. *Moore* (1861), 9 H. L. Cas. 440, *per* Lord CRANWORTH, at p. 470; *Nugent* v. *Vetzera, supra; Re Savini (Gori)*, *Savini* v. *Lonsada, supra*.

(*h*) *Re Bourgoise* (1889), 41 Ch. D. 310, C. A.

(*i*) *Stuart* v. *Bute (Marquis)*, *Stuart* v. *Moore, supra*, at pp. 456, 457. As to wards of court, see pp. 146 *et seq.*, *post*. As to appointment by the court of guardians to act jointly with the mother, see p. 125, *ante*.

(*k*) *Re Newcastle (Duke)* (1795), cited in *Ex parte Mountfort, supra*, at p. 447

unless such a course would be disadvantageous to the infant (*l*); and in other cases will preferably select the nearest relative of the infant (*m*). The court will not generally appoint as sole guardian a person residing out of the jurisdiction (*n*), unless he is already a guardian out of the jurisdiction (*o*), and will not appoint as sole guardian a married woman (*p*), nor, as a guardian, the solicitor to any of the parties concerned (*q*), nor a firm (*r*). The discretion of the court of first instance in the appointment will not be interfered with by the Court of Appeal, except for strong reasons (*s*).

Death of one of several guardians.

295. Where several guardians are appointed by the court, the death of one terminates the guardianship of all (*a*); but the court will usually reappoint the survivors as a matter of course (*b*).

Guardians for special purposes.

Guardians can be appointed by the court for special purposes, such as to give consent or convey land on behalf of the infant under the provisions of an Act of Parliament (*c*), or to give consent to the marriage of the infant (*d*), or to protect his interests under a Bill before Parliament (*e*).

Hall v. *Storer* (1835), 1 Y. & C. (EX.) 556; *Re Kaye* (1866), 1 Ch. App. 387, *per* TURNER, L.J., at p. 390. As to appointment of guardians by the court where the infant has already appointed a guardian, see pp. 58, 59, *ante*.

(*l*) *Hartley* v. *Smith* (1863), 9 Jur. (N. S.) 97; *Re Wood, Minors* (1867), 16 W. R. 164.

(*m*) *Beattie* v. *Johnstone* (1841), 1 Ph. 17, *per* Lord COTTENHAM, L.C., at pp. 34, 35. The court has appointed as guardian of the infant the maternal great aunt (*Re Jones* (1826), 1 Russ. 478), the maternal uncle (*Ex parte Jackson* (1833), 6 Sim. 212), and an uncle and aunt (*Re Neale* (1852), 15 Beav. 250).

(*n*) *Logan* v. *Fairlee* (1821), Jac. 193. But where the infant was residing out of the jurisdiction, his mother, also residing out of the jurisdiction, and a relative in this country, were jointly appointed his guardians (*Lockwood* v. *Fenton* (1852), 1 Sm. & G. 73). And persons residing out of the jurisdiction may be appointed guardians, jointly with a person within the jurisdiction in the case of an infant residing in this country (*Johnstone* v. *Beattie* (1843), 10 Cl. & Fin. 42, H. L.).

(*o*) See p. 126, *ante*.

(*p*) *Re Kaye, supra, per* KNIGHT BRUCE, L.J., at p. 389. But a married woman has been appointed sole guardian of an illegitimate child (*Wallis* v. *Campbell* (1807), 13 Ves. 517).

(*q*) *Re Johnstons, Minors, Ex parte Yeates* (1845), 2 Jo. & Lat. 222.

(*r*) *De Mazar* v. *Pybus* (1799), 4 Ves. 644, 649.

(*s*) *Re Kaye, supra, per* KNIGHT BRUCE, L.J., at p. 389.

(*a*) *Bradshaw* v. *Bradshaw* (1826), 1 Russ. 528; *Hall* v. *Jones* (1827), 2 Sim. 41. Compare the different rule in regard to testamentary guardians (p. 124, *ante*).

(*b*) *Hall* v. *Jones, supra*.

(*c*) A guardian has been appointed to consent to an application under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), and the Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56) (*Re Manchester* (*Duke*) (1870), 2 Seton, Judgments and Orders, 6th ed., p. 994; *Re Blundell* (1871), 2 Seton, Judgments and Orders, 6th ed., p. 994; *Re Sefton* (*Lord*) (1871), 2 Seton, Judgments and Orders, 6th ed., p. 994), and to convey land under the Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50) (2 Seton, Judgments and Orders, 6th ed., p. 995).

(*d*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 16; *Re Woolscombe, an Infant* (1816), 1 Madd. 213; *Re Moorcroft* (1835), 2 Seton, Judgments and Orders, 6th ed., p. 995.

(*e*) *Re Wharton* (1856), 2 Seton, Judgments and Orders, 6th ed., p. 995.

SECT. 2. **Authority over Person and Estate.**

SECT. 2.—*Authority over Person and Estate.*

Guardians of person and estate.

296. A guardian may be either of the person or of the estate of the infant or both (*f*). A guardian of the person only has no authority over the infant's property (*g*), and a guardian of his estate only has no authority over his person (*h*). Guardianship both of the person and the estate belongs to a guardian in socage (*i*), and to a testamentary guardian (*k*), and to the mother after the father's death (*l*). The father, as guardian for nurture or by nature (*m*), is only a guardian of the person of the infant (*n*). A guardian appointed by the court is, in the absence of express direction, only a guardian of the infant's person (*o*); but the court may appoint him, or a separate person, to be guardian of the infant's estate (*p*).

Disagreement of guardians.

297. Where there is more than one guardian, and they are unable to agree upon a question affecting the welfare of the infant, the court, having jurisdiction in the matter, may, upon the application of any of them, make any orders regarding the matters in difference which it thinks proper (*q*).

Control of court.

If a guardian acts in a manner calculated to prejudice the infant, the Chancery Division of the High Court has inherent jurisdiction to interfere (*r*).

(*f*) *Re Pavitt*, [1907] I. R. 234. "An infant may have several guardians; he may have a guardian of the person, or a guardian in socage, or in gavelkind, or, if he has a copyhold estate, a guardian according to the custom of the manor" (*Rimington* v. *Hartley* (1880), 14 Ch. D. 630, *per* JESSEL, M.R., at p. 632). But where in an enactment the word "guardian" simply, is used, it means guardian of the person (*ibid.*). As to where questions of domicil and foreign law arise, see title CONFLICT OF LAWS, Vol. VI., p. 281.

(*g*) *Re Bond* (1846), 11 Jur. 114; *Re Salisbury* (*Marquis*) *and Ecclesiastical Commissioners* (1876), 2 Ch. D. 29, C. A., *per* MELLISH, L.J., at p. 36.

(*h*) *Re Pavitt*, *supra*; 2 Seton, Judgments and Orders, 6th ed., p. 992.

(*i*) Co. Litt. 88 b, Hargrave's note (13); see pp. 121, 122, *ante*.

(*k*) Stat. (1660) 12 Car. 2, c. 24, s. 9; *Beaufort* (*Duke*) v. *Berty* (1721), 1 P. Wms. 703, *per* Lord MACCLESFIELD, L.C., at p. 704; *Mathew* v. *Brise* (1851), 14 Beav. 341, *per* ROMILLY, M.R., at p. 345; see pp. 123 *et seq.*, *ante*.

(*l*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 2, 4; see pp. 123 *et seq.*, *ante*.

(*m*) See pp. 122, 123, *ante*.

(*n*) Co. Litt. 84 b, 88 b, Hargrave's note (12); *R.* v. *Thorp* (1696), Carth. 384, 386; *R.* v. *Sherrington* (*Inhabitants*) (1832), 3 B. & Ad. 714, *per* PARKE, J., at p. 716.

(*o*) *Re Willoughby* (*an Infant*) (1885), 30 Ch. D. 324, 330, C. A.

(*p*) *Re Bond*, *supra*; *Re Willoughby* (*an Infant*), *supra*, at p. 330 *Re Pavitt*, *supra*. The infant's father will, if circumstances so require, be appointed guardian of his estate (*Re Bond*, *supra*). The court sometimes appoints separate persons to be guardians of the person and estate of the infant (2 Seton, Judgments and Orders, 6th ed., p. 992; and cases in chambers there cited). In the case of an infant who is the subject of a foreign country guardians may be appointed without prejudice to his foreign guardian having the exclusive right of custody and control (*Nugent* v. *Vetzera* (1866), L. R. 2 Eq. 704).

(*q*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 3 (3). The court having the jurisdiction is the Chancery Division of the High Court or Justice or the county court of the district in which any respondent to the application resides (*ibid.*, s. 9). See title COUNTY COURTS, Vol. VIII., p. 654.

(*r*) *Beaufort* (*Duke*) v. *Berty*, *supra*, *per* Lord MACCLESFIELD, L.C., at p. 705;

SECT. 2. Authority over Person and Estate.

298. Where a lunatic is a guardian, powers and consents vested in him as such may, under an order of the Judge in Lunacy, be exercised, or given by the committee of his estate (*s*).

SECT. 3.—*Rights and Duties as to the Person.*

SUB-SECT. 1.—*Custody.*

Lunatic guardians.

Custody and control of ward.

299. A guardian is entitled to the custody and control of his infant ward (*t*), and he can obtain by legal proceedings the restoration to his custody of a ward, who has been removed or is being kept therefrom (*u*). But the Chancery Division of the High Court has jurisdiction to interfere with his right of custody, and to commit the custody of the infant to another person (*a*); and, in the case of an infant of years of discretion, weight will be given to his inclination as to where he will reside (*b*).

Control of court.

Change of custody where expedient.

300. The Chancery Division will, where it is in accordance with the express wish of the father, or it appears otherwise expedient to do so, place the infant under the custody and control of some other person, leaving the guardian a general superintendence over the infant and his affairs (*c*).

SUB-SECT. 2.—*Maintenance.*

Application of infant's income.

301. Subject to the statutory provisions and general law as to the maintenance of infants (*d*), it is the duty of a guardian to apply

Roach v. *Garvan* (1748), 1 Ves. Sen. 157, *per* Lord HARDWICKE, L.C., at p. 160; *Ingham* v. *Bickerdike* (1822), Madd. & G. 275. As to removal of guardians, see p. 125, *ante*. As to an account against a guardian, see *Macrae* v. *Harness* (1910), 103 L. T. 629.

(*s*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 128; and see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*t*) Co. Litt. 87 b *et seq.*; 3 Bl. Com. 141; Bac. Abr., tit. Guardian (F.), 7th ed., p. 105; stat. (1660) 12 Car. 2, c. 24, s. 8; *R.* v. *Johnson* (1724), 8 Mod. Rep. 214; *Fleming* v. *Pratt* (1823), 1 L. J. (O. S.) (K. B.) 194; *R.* v. *Isley* (1836), 5 Ad. & El. 441; *Re Andrews* (1873), L. R. 8 Q. B. 153. The power and reciprocal duty of a guardian and ward are the same *pro tempore* as that of a father and child (1 Bl. Com. 462).

(*u*) Stat. (1660) 12 Car. 2, c. 24, s. 8. Restoration of custody can be obtained by a writ of *habeas corpus* (*Anglesey* (*Lord*) v. *Ossory* (*Lord*) (1675), 3 Keb. 528; *R.* v. *Isley*, *supra*; *Re Andrews*, *supra*; and see title CROWN PRACTICE, Vol. X., pp. 52, 53), or by petition to the Chancery Division of the High Court (*Re Spence* (1847), 2 Ph. 247). Where the title of the guardian is disputed, the court will direct its validity to be duly tried (*Re Andrews*, *supra*). Where there are two testamentary guardians and the infant is in the custody of one, the other guardian is not justified in forcibly removing him from such custody (*Gilbert* v. *Schwenck* (1845), 14 M. & W. 488).

(*a*) *Beaufort* (*Duke*) v. *Berty* (1721), 1 P. Wms. 703; *Storke* v. *Storke* (1730), 3 P. Wms. 51, 52; *Talbot* v. *Shrewsbury* (*Earl*), *Doyle* v. *Wright* (1840), 4 My. & Cr. 672, *per* Lord COTTENHAM, L.C., at p. 683.

(*b*) *Storke* v. *Storke*, *supra*, at p. 52; *Anon.* (1751), 2 Ves. Sen. 374; *R.* v. *Delaval* (1763), 3 Burr. 1434, *per* Lord MANSFIELD, C.J., at p. 1436; *Re Andrews*, *supra*, at pp. 158, 159; and compare the provision as to removal of a child from the custody of an undesirable person, p. 165, *post*.

(*c*) *Knott* v. *Cottee* (1847), 2 Ph. 192. As to the removal of an infant from the custody of a guardian who has been party or privy to an offence against him, see p. 128, *ante*.

(*d*) See pp. 85 *et seq.*, *ante*.

SECT. 3. Rights and Duties as to the Person.

the income of the infant's property, so far as may be necessary, for his proper maintenance according to his position in life and expectations (*e*), and to take, when necessary, the advice of the court on the subject (*f*). There is no obligation on a guardian to expend his own money on the maintenance of his ward (*g*).

SUB-SECT. 3.—*Education.*

Control over education.

302. A guardian has the right to control the education of his ward (*h*); but he must educate the ward according to his position in life and expectations (*i*), and should pay regard to the wishes of his father or mother in the matter so far as they are known (*k*).

SUB-SECT. 4.—*Advancement.*

Advancement out of capital.

303. A guardian can only make an advancement out of the capital of the infant's property for his benefit where it is authorised under a settlement or will (*l*), or where a court directs the advancement (*m*).

SUB-SECT. 5.—*Marriage.*

Consent to marriage.

304. The consent of a guardian to the marriage of his ward, the necessity for which has already been dealt with (*n*), must be honestly given, and any corrupt agreement or arrangement in respect of it will be void (*o*).

Prevention of unsuitable marriage.

The guardian must see that a proposed marriage of his ward is suitable, and endeavour to stop an unsuitable marriage (*p*), and, if necessary, invoke the assistance of the court for that purpose (*q*). The court, in considering the propriety of the marriage, is not bound by the consent of the guardian to it, and will in some cases refuse to sanction it in spite of that consent (*r*).

(*e*) Co. Litt. 87 b; *Carmichael* v. *Wilson* (1830), 3 Mol. 79, 80, 83.

(*f*) 1 Bl. Com. 463.

(*g*) *Carmichael* v. *Wilson*, *supra*.

(*h*) The ward will be compelled to go to the school or university which th guardian selects for him (*Tremain's Case* (1719), 1 Stra. 168; *Hall* v. *Hall* (1749) 3 Atk. 721; *Mitchel* v. *Manchester* (*Duke*) (1751), 1 Dick. 149).

(*i*) *Powel* v. *Cleaver* (1789), 2 Bro. C. C. 499; *Colston* v. *Morris* (1820), cite in *Lyons* v. *Blenkin* (1821), Jac. 245, 257, n. (a).

(*k*) *Campbell* v. *Mackay* (1837), 2 My. & Cr. 31, *per* Lord COTTENHAM, L.C at pp. 34, 37. Parol evidence will be admitted as to the parent's wishes (*Ano* (1750), 2 Ves. Sen. 56). It is the duty of a guardian to teach the infant dutif feeling towards a surviving parent (*Ex parte Ilchester* (*Earl*) (1803), 7 Ves. 34 *per* Lord ELDON, L.C., at p. 381). As to the religious education of an infan see pp. 112, 113, *ante*; and title EDUCATION, Vol. XII., pp. 24, 36, 38, 39.

(*l*) See pp. 92 *et seq.*, *ante*.

(*m*) *Carmichael* v. *Wilson*, *supra*, at pp. 86 *et seq.*

(*n*) See note (*g*), p. 57, *ante*; and title HUSBAND AND WIFE, Vol. XV pp. 290, 296, 297.

(*o*) *Redman* v. *Redman* (1685), 1 Vern. 348; *Keat* v. *Allen* (1707), 2 Ve 588; *Hamilton* (*Duke*) v. *Mohun* (*Lord*) (1710), 1 P. Wms. 118.

(*p*) *Barker* v. *Taylor* (1823), 1 C. & P. 101, *per* PARK, J., at p. 102. T clothes of the ward could be justifiably detained for the purpose (*ibid.*).

(*q*) *Smith* v. *Smith* (1746), 3 Atk. 304.

(*r*) *Gordon* (*Lord W.*) v. *Irwin* (*Viscountess*) (1781), 4 Bro. Parl. Cas. 3 *Wellesley* v. *Beaufort* (*Duke*) (1827), 2 Russ. 1, *per* Lord ELDON, L.C., pp. 28, 29.

SECT. 4.—*Rights and Duties as to the Estate.*

SECT. 4. Rights and Duties as to the Estate.

SUB-SECT. 1.—*General Management.*

Guardian in socage.

305. A guardian in socage (*s*) has the right to the possession and control of all the lands of his ward, including copyholds (*a*), and has an interest in them and the duty and powers of managing them on behalf of and for the benefit of the ward (*b*). He has the right to receive the rents and profits, and must apply them in the discharge of any obligations subsisting on the land (*c*), in keeping down the interest of incumbrances (*d*), and in maintaining the ward (*e*), and must account to the ward for them (*f*).

Testamentary guardian.

306. A testamentary guardian has the right and duty of receiving the rents and profits of the lands, and of managing the personal estate of the ward for the benefit of the latter until the ward attains full age, or during any shorter period for which he is appointed guardian, and may bring such actions in relation thereto as can by law be brought by a guardian in socage (*g*); and

(*s*) See pp. 121, 122, *ante*.

(*a*) Co. Litt. 88 b, Hargrave's Note (13); Com. Dig., tit. Gardian (B. 3); *Goodtitle* d. *Newman* v. *Newman* (1774), 3 Wils. 516; *R.* v. *Wilby* (*Inhabitants*) (1814), 2 M. & S. 504; *R.* v. *Sutton* (1835), 3 Ad. & El. 597, 612, 613. But if the infant has copyhold lands held of a manor in which there is a customary guardianship (see p. 122, *ante*), the customary guardian will have the possession and management of those lands (*Clench* v. *Cudmore* (1694), 3 Lev. 395).

(*b*) *R.* v. *Oakley* (*Inhabitants*) (1809), 10 East, 491, 494, 495.

(*c*) *R.* v. *Sutton*, *supra*. As to the obligations as between an infant tenant for life and the remainderman, see title SETTLEMENTS.

(*d*) *Palmer* v. *Danby* (1701), 1 Eq. Cas. Abr. 261; *Jennings* v. *Looks* (1725), 2 P. Wms. 276, 278. As to applying an infant's capital to paying off the principal of a mortgage, see *Norbury* v. *Norbury* (1819), 4 Madd. 191.

(*e*) Co. Litt. 87 b; Com. Dig., tit. Gardian (B. 4).

(*f*) Co. Litt. 87 b, 89 a.

(*g*) Stat. (1660) 12 Car. 2, c. 24, s. 9; *Bedell* v. *Constable* (1668), Vaugh. 177; *Beaufort* (*Duke*) v. *Berty* (1721), 1 P. Wms. 703, 704; *Eyre* v. *Shaftsbury* (*Countess*) (1723), 2 P. Wms. 103, 122; *R.* v. *Sherrington* (*Inhabitants*) (1832), 3 B. & Ad. 714, *per* Lord TENTERDEN, C.J., at p. 716. A testamentary guardian has the right to receive the rents and profits of the infant's land as against trustees for the purposes of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and the amending Acts (as to which see title SETTLEMENTS), but not as against trustees under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42 (*Re Helyar*, *Helyar* v. *Beckett*, [1902] 1 Ch. 391). A receiver of the rents and profits of the infant's land will, if the circumstances render it desirable, be appointed as against his testamentary guardian (*Gardner* v. *Blane* (1842), 1 Hare, 381); and as to receivers generally, see title RECEIVERS. The precise extent of the powers of a testamentary guardian over the infant's property is by no means certain. He has no estate in it and is frequently unable to act without the assistance of the court (*ibid.*, *per* WIGRAM, V.-C., at p. 382). He can give a good discharge for a legacy payable to the infant (*M'Creight* v. *M'Creight* (1849), 13 I. Eq. R. 314; *Re Long*, *Lovegrove* v. *Long*, [1901] W. N. 166), and compare title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 271. It has been held that the guardian of an infant registered owner of a ship has no power to sell or mortgage the ship under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 99, re-enacted by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 55 (*Michael* v. *Fripp* (1868), L. R. 7 Eq. 95, compromised on appeal, [1873] W. N. 217). A guardian who has expended the income on improvements and has further advanced money of his own for that purpose may be entitled to be recouped (*Dacre* v. *Strachan* (1856), 4 W. R. 401; and see *Hooper* v. *Eyles* (1705), 2 Vern. 480).

SECT. 4. Rights and Duties as to the Estate.

he is under the same liability to account for profits and income of the estate received by him (*h*).

Guardian appointed by court.

307. A guardian appointed by the court may have special powers and duties assigned to him with respect to the infant's estate (*i*).

Special powers as to land.

308. A guardian can contract on behalf of his ward for the redemption of land tax, and may pay the instalments of the redemption money out of his ward's estate (*k*). The Tithe Act, 1836 (*l*), empowered a guardian to act on behalf of his ward with respect to the commutation of tithe and other purposes (*m*).

SUB-SECT. 2.—*Leasing of Land.*

Leases by guardian in socage, and testamentary guardian.

309. A lease of the land of an infant can be granted by a guardian in socage to last until the infant attains the age of fourteen (*n*), and by a testamentary guardian to last until the infant attains full age (*o*). A lease granted by either guardian for a longer period may be either repudiated or confirmed by the infant after attaining full age (*p*). In order, therefore, to make a valid further lease of the infant's land, recourse must be had to the provisions of the Infants' Property Act, 1830 (*q*), or of the Settled Land Acts, 1882 to 1890 (*r*).

SUB-SECT. 3.—*Sale of Land.*

Alienation of infant's real estate.

310. A guardian cannot alienate the real estate of his ward (*s*), except where power to do so for some public or special purpose has

(*h*) *Mathew* v. *Brise* (1851), 14 Beav. 341. Where a guardian continues to manage the estate after the ward has attained full age, his liability to account continues as if the ward were still an infant (*Mellish* v. *Mellish* (1823), 1 Sim. & St. 138).

(*i*) See pp. 127, 128, *ante*.

(*k*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 14, 166. As to redemption of land tax, see title LAND TAX.

(*l*) 6 & 7 Will. 4, c. 71.

(*m*) *Ibid.*, s. 15. As to tithe commutation generally, see title ECCLESIASTICAL LAW, Vol. XI., p. 745.

(*n*) *Brisden* v. *Hussey* (1607), 2 Roll. Abr. 41, tit. Garde (Q.), 4; Com. Dig. tit. Gardian (B. 4); *Wade* v. *Baker* (1696), 1 Ld. Raym. 130; *R.* v. *Oakley* (*Inhabitants*) (1809), 10 East, 491, 494, 495. See title DISTRESS, Vol. XI., p. 130.

(*o*) *Roe* d. *Parry* v. *Hodgson* (1761), 2 Wils. 129, 135; *Eyre* v. *Shaftsbury* (*Countess*) (1723), 2 P. Wms. 103, 122; *Shaw* v. *Shaw* (1788), Vern. & Scr. 607.

(*p*) Bac. Abr., tit. Guardian (G.), 7th ed., p. 106; tit. Leases and Terms for Years (I.), 9, 7th ed., p. 784. But in *Roe* d. *Parry* v. *Hodgson*, *supra*, it was held that a lease for a longer period was absolutely void.

(*q*) 11 Geo. 4 & 1 Will. 4, c. 65; see p. 100, *ante*.

(*r*) (1882) 45 & 46 Vict. c. 38; (1884) 47 & 48 Vict. c. 18; (1887) 50 & 51 Vict. c. 30; (1889) 52 & 53 Vict. c. 36; (1890) 53 & 54 Vict. c. 69; see pp. 99, 100, *ante*; and title LANDLORD AND TENANT. If there are no trustees of the land for the purposes of these Acts and no person authorised to exercise with respect to the land the powers of a tenant for life under these Acts, the guardian can apply to the Chancery Division of the High Court of Justice for the appointment of such trustees and persons respectively (Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 38, 60). The provisions of these Acts have practically superseded the provisions of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18); see note (*b*) p. 94, *ante*.

(*s*) Bac. Abr., tit. Guardian (G.), 7th ed., p. 107. *Field* v. *Moore*, *Field* v. *Brown* (1855), 7 De G. M. & G. 691, 706, 707, C. A.

been expressly conferred on him by statute (*t*). In other cases recourse must be had to the provisions of the Settled Land Acts, 1882 to 1890 (*a*).

SECT. 4. Rights and Duties as to the Estate.

SUB-SECT. 4.—*Partition of Land.*

Partition.

311. If a guardian in socage, or a testamentary guardian, concurs in a partition of land on behalf of his ward, the partition will be binding on the ward if it is equal (*b*), but if it is unequal, it may be either repudiated or confirmed by the ward on his attaining full age (*c*).

Request for sale or undertaking for purchase.

In an action for partition, under the Partition Act, 1868 (*d*), and the Partition Act, 1876 (*e*), a request for sale may be made, or an undertaking for purchase given, on the part of an infant by his guardian or other person authorised to act on his behalf (*f*).

Part VIII.—Legal Proceedings.

SECT. 1.—*On Behalf of Infants.*

SUB-SECT. 1.—*Commencement by Next Friend.*

Proceedings by next friend.

312. An infant cannot in person assert his rights in a court of law as plaintiff or applicant (*g*), and cannot make himself liable to a defendant or respondent for costs (*h*), with the single exception that he may sue in a county court for a sum not exceeding £100 due to him for wages, or piecework, or for work as a servant in the same manner as if he were of full age (*i*). Consequently he must institute and carry on all proceedings by his guardian or some other person who is called his *prochein amy* or next friend (*k*),

(*t*) See pp. 82, 83, 127, *ante*.

(*a*) See note (*r*), p. 132, and pp. 94, 95, 99, 100, *ante*.

(*b*) Co. Litt. 171 a; Bac. Abr., tit. Guardian (G.), 7th ed., p. 107; and see title PARTITION.

(*c*) Co. Litt. 171 b.

(*d*) 31 & 32 Vict. c. 40.

(*e*) 39 & 40 Vict. c. 17.

(*f*) *Ibid.*, s. 6. See p. 82, *ante*, and title PARTITION. The power has been variously held to be exercisable by a testamentary guardian or a guardian appointed by the court (*Platt* v. *Platt* (1880), 28 W. R. 533, *per* MALINS, V.-C.), or by a guardian *ad litem* (*Rimington* v. *Hartley* (1880), 14 Ch. D. 630, *per* JESSEL, M.R., at p. 632).

(*g*) Co. Litt. 135 b, Hargrave's note (1); 1 Bl. Com. 464; *Goodwin* v. *Moore* (1629), Cro. Car. 161. An infant cannot sue in his own name or give an authority to any one to sue in his name or ratify the acts of any one who does so sue (*Geilinger* v. *Gibbs*, [1897] 1 Ch. 479, *per* KEKEWICH, J., at p. 482).

(*h*) *Turner* v. *Turner* (1726), 2 Stra. 708.

(*i*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 96; County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3. See also title COUNTY COURTS, Vol. VIII., p. 455.

(*k*) Co. Litt. 135 b, Hargrave's note (1); 1 Bl. Com. 464; R. S. C. (1883), Ord. 16, r. 16 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court England, p. 82); County Court Rules, Ord. 3, r. 10, Form No. 15 (Statutory Rules and Orders Revised, Vol. III., County Court, England, pp. 100, 314). The rule applies to a petition as well as to an action (*Re Russell's Estate* (1851), 20

SECT. 1. On Behalf of Infants.

and who is for most purposes *dominus litis* (*l*). Any person who is not himself incapable of instituting proceedings (*m*), and is not connected with the defendant (*n*), or otherwise interested adversely to the infant (*o*), may be next friend (*p*). Preference will be given to the father (*q*) or mother (*r*) or guardian (*s*), or some other of the relatives or connections of the infant or their nominee (*t*); but he must be a substantial and proper person (*a*). Before his name is used in an action in the High Court of Justice, he must sign a written authority to the solicitor for the purpose, which must be filed in the Central Office of the Supreme Court, or in

L. J. (CH.) 384); and it applies to an infant married woman suing as a *feme sole* under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63) (see *Colman* v. *Northcote* (1842), 2 Hare, 147). If an infant is made a co-plaintiff without a next friend, the solicitors for the plaintiffs may be ordered personally to pay to the defendants the costs of the action so far as they are attributable to his having been made a party to it (*Geilinger* v. *Gibbs*, [1897] 1 Ch. 479); but leave may be given to amend by adding a next friend (*Flight* v. *Bolland* (1828), 4 Russ. 298). An action can, however, proceed without a next friend if the defendant does not object (*Re Brocklebank*, *Ex parte Brocklebank* (1877), 6 Ch. D. 358, C. A., *per* JAMES, L.J., at p. 360). See also titles ACTION, Vol. I., p. 21; HUSBAND AND WIFE, Vol. XVI., p. 504; and the Yearly Practice of the Supreme Court, 1911, pp. 161 *et seq.*

(*l*) *Russell* v. *Sharpe* (1820), 1 Jac. & W. 482; *Almack* v. *Moore* (1878), 2 L. R. Ir. 90; *Knatchbull* v. *Fowle* (1876), 1 Ch. D. 604; *Fryer* v. *Wiseman* (1876), 45 L. J. (CH.) 199; but see *Dyke* v. *Stephens* (1885), 30 Ch. D. 189, *per* PEARSON, J., at pp. 190, 191; *Catt* v. *Wood*, [1908] 2 K. B. 458, C. A., *per* KENNEDY, L.J., at p. 473. The solicitor in the proceedings is the solicitor of the next friend and not of the infant (*Almack* v. *Moore*, *supra*, at p. 93). As to the relationship of solicitor and client in general, see title SOLICITORS.

(*m*) *Re Somerset* (*Duke*), *Thynne* v. *St. Maur* (1887), 34 Ch. D. 465. A married woman cannot be next friend (*ibid.*).

(*n*) The office cannot be filled by the defendant himself (*Anon.* (1847), 11 Jur. 258; *Lewis* v. *Nobbs* (1878), 8 Ch. D. 591, 593); nor by a friend of the defendant who undertakes the office at his request (*Re Burgess*, *Burgess* v. *Bottomley* (1883), 25 Ch. D. 243, C. A.).

(*o*) *Jacob* v. *Lucas* (1839), 1 Beav. 436.

(*p*) 1 Bl. Com. 464; *Anon.* (1739), 1 Atk. 570; *Whittaker* v. *Marlar* (1786), 1 Cox, Eq. Cas. 285, 286; *Harrison* v. *Harrison* (1842), 5 Beav. 130; *Jones* v. *Evans* (1886), 31 Sol. Jo. 11. The official solicitor (see title COURTS, Vol. IX., p. 71) may be appointed next friend (*Re Corsellis*, *Lawton* v. *Elwes* (1884), 32 W. R. 965, C. A.; *Re W.*, *W.* v. *M.*, [1907] 2 Ch. 557, 568, C. A.). The next friend does not require any authority from the infant, and the infant has no voice in his selection (*Morgan* v. *Thorne* (1841), 7 M. & W. 400, *per* PARKE, B., at p. 408).

(*q*) *Watson* v. *Fraser* (1841), 8 M. & W. 660; *Woolf* v. *Pemberton* (1877), 6 Ch. D. 19, C. A.

(*r*) *Harris* v. *Lightfoot*, *Harris* v. *Harris* (1861), 10 W. R. 31.

(*s*) 1 Bl. Com. 464; *Hutchinson* v. *Norwood* (1885), 31 Ch. D. 237. An infant by his next friend may institute proceedings against his guardian (1 Bl. Com. 464).

(*t*) *Talbot* v. *Talbot* (1874), L. R. 17 Eq. 347.

(*a*) *Anon.* (1739), 1 Atk. 570; *Nalder* v. *Hawkins* (1833), 2 My. & K. 243; *Walker* v. *Else* (1835), 7 Sim. 234. If the infant can procure a solvent person willing to act as next friend, an insolvent next friend may be removed and the proceedings stayed until another is appointed (*Watson* v. *Fraser*, *supra*; *Lees* v. *Smith* (1860), 5 H. & N. 632; but see *Duckitt* v. *Satchwell* (1844), 13 M. & W. 779).

the district registry, if the cause or matter is proceeding in a district registry (*b*).

A next friend is liable to be ordered to pay the costs of the proceedings (*c*); but he will not be ordered to give security for costs (*d*), except in the case of an appeal by an insolvent next friend against the decision of the court of first instance (*e*).

Liability for costs.

If an action brought by one next friend is dismissed, the fact of the costs of that action not having been paid will not prevent the infant from bringing a new action by another next friend (*f*).

Fresh action by different next friend.

The next friend is an officer of the court appointed to look after the interests of the infant (*g*), and has the conduct of the proceedings in his hands (*h*). But he is not actually a party to the proceedings (*i*), and is not entitled to appear in them in person (*k*).

Standing.

The infant may sue by a next friend *in formâ pauperis*, but only upon strict proof that the infant cannot obtain a more substantial next friend (*l*).

Next friend suing *in formâ pauperis*.

Upon the application of the defendant, or of a next friend of the infant appointed for the purpose, the court can, if it thinks fit (*m*), direct an inquiry whether the proceedings are for the benefit of the infant (*n*), and if it appears that they are not, can deal with the proceedings as it thinks fit (*o*).

Inquiry as to fitness of proceedings.

(*b*) R. S. C. (1883), Ord. 16, r. 20 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 82). Where a person is named as next friend without his sanction, he can apply to have his name struck out (*Ward* v. *Ward* (1843), 6 Beav. 251), but he is liable to the defendant for costs (*Bligh* v. *Tredgett* (1851), 5 De G. & Sm. 74).

(*c*) *Slaughter* v. *Talbott* (1739), Willes, 190; *Ward* v. *Ward*, *supra*; *Bligh* v. *Tredgett*, *supra*. As to his right to recover the costs from the infant or his estate, see p. 139, *post*.

(*d*) *Squirrel* v. *Squirrel* (1792), 2 Dick. 765; *St. John* v. *Besborough* (*Earl*) (1819), 1 Hog. 41; *Yarworth* v. *Mitchel* (1823), 2 Dow. & Ry. (K. B.) 423; *Fellows* v. *Barrett* (1836), 1 Keen, 119; *Murrell* v. *Clapham* (1836), 8 Sim. 74; *Hind* v. *Whitmore* (1856), 2 K. & J. 458; *Martano* v. *Mann* (1880), 14 Ch. D. 419, C. A.; *Re Payne*, *Randle* v. *Payne* (1883), 23 Ch. D. 288, 289, C. A.; *Jones* v. *Evans* (1886), 31 Sol. Jo. 11.

(*e*) *Swain* v. *Follows* (1887), 18 Q. B. D. 585.

(*f*) *Re Payne*, *Randle* v. *Payne*, *supra*, *per* COTTON, L.J., at p. 289.

(*g*) *Morgan* v. *Thorne* (1841), 7 M. & W. 400, *per* PARKE, B., at p. 408; *Sinclair* v. *Sinclair* (1845), 13 M. & W. 640; *Rhodes* v. *Swithenbank* (1889), 22 Q. B. D. 577, C. A., *per* BOWEN, L.J., at p. 579.

(*h*) *Rhodes* v. *Swithenbank*, *supra*, *per* Lord ESHER, M.R., at p. 578.

(*i*) *Sinclair* v. *Sinclair*, *supra*, at p. 646; *Dyke* v. *Stephens* (1885), 30 Ch. D. 189, *per* PEARSON, J., at p. 190; but see *Catt* v. *Wood*, [1908] 2 K. B. 458, C. A., *per* KENNEDY, L.J., at p. 473.

(*k*) *Re Hurst*, *Addison* v. *Topp* (1891), 36 Sol. Jo. 41, C. A.; *Murray* v. *Sitwell*, [1902] W. N. 119; *Re Berry*, *Berry* v. *Berry*, [1903] W. N. 125.

(*l*) *Briant* v. *Wagner* (1839), 3 Jur. 460; *Lindsey* v. *Tyrrell* (1857), 2 De G. & J. 7, C. A.

(*m*) The direction of an inquiry is in the discretion of the court (*Stevens* v. *Stevens* (1821), Madd. & G. 97; *Smallwood* v. *Rutter* (1851), 9 Hare, 24; *Pensotti* v. *Pensotti* (1874), 22 W. R. 461, C. A.).

(*n*) *Richardson* v. *Miller* (1826), 1 Sim. 133; *Nalder* v. *Hawkins* (1833), 2 My. & K. 243; *Clayton* v. *Clarke* (1860), 2 L. T. 302; *Towsey* v. *Groves* (1863), 11 W. R. 252; *Pensotti* v. *Pensotti*, *supra*; *Thomas* v. *Elsum* (1877), 46 L. J. (CH.) 793; *Percival* v. *Cross* (1882), 7 P. D. 234; *Golds* v. *Kerr*, [1884] W. N. 46; *Re Corsellis*, *Lawton* v. *Elwes* (1884), 32 W. R. 965, C. A. As to removing the next friend as a result of such inquiry, see p. 136, *post*.

(*o*) The court may stay the action (*Da Costa* v. *Da Costa* (1732), 3 P. Wms.

SECT. 1. On Behalf of Infants.

Concurrent actions by two next friends.

Where two actions have been instituted on behalf of an infant for the same purpose, an inquiry will be directed as to which action is the more proper, and the more for his benefit (*p*), and according to the result of such inquiry the first action will either be allowed to proceed (*q*), or be stayed (*r*), or be dismissed (*s*), or the conduct of the second action may be given to the next friend in the first action (*t*).

SUB-SECT. 2.—*Change of Next Friend.*

Removal of next friend.

313. The court can remove a next friend if he is an improper person to act as such (*a*), or does not conduct the action in a proper manner (*b*); but the next friend is allowed an opportunity of showing cause against his removal (*c*). The father or testamentary guardian, against whom there is no personal objection, is entitled to be substituted for a stranger as the infant's next friend in an action (*d*).

Retirement of next friend.

A next friend cannot retire without showing that it is for the

140; *Anderton* v. *Yates* (1852), 5 De G. & Sm. 202), or dismiss it with costs against the next friend (*Fox* v. *Suwerkrop* (1839), 1 Beav. 583; *Golds* v. *Kerr*, [1884] W. N. 46), or reject the application and order the applicant to pay the costs of the inquiry (*Raven* v. *Kerl* (1848), 2 Ph. 692). In a clear case the court may dismiss the action without directing an inquiry (*Walker* v. *Else* (1835), 7 Sim. 234; *Sale* v. *Sale* (1839), 1 Beav. 586; *Guy* v. *Guy* (1840), 2 Beav. 460).

(*p*) *Sullivan* v. *Sullivan* (1816), 2 Mer. 40; *Starten* v. *Bartholomew* (1842), 5 Beav. 372; (1843), 6 Beav. 143. As to where infants were co-plaintiffs with adults in two suits for the same purpose, see *Mortimer* v. *West*, *Forde* v. *West* (1818), 1 Swan. 358.

(*q*) *Harris* v. *Lightfoot*, *Harris* v. *Harris* (1861), 10 W. R. 31.

(*r*) *Virtue* v. *Miller* (1871), 19 W. R. 406.

(*s*) *Starten* v. *Bartholomew* (1843), 6 Beav. 143. As a rule the action in which a relative is next friend will be preferred to that in which the next friend is a stranger (*Harris* v. *Lightfoot*, *Harris* v. *Harris*, *supra*; *Virtue* v. *Miller*, *supra*).

(*t*) *Frost* v. *Ward* (1864), 2 De G. J. & Sm. 70, C. A.

(*a*) As where he has an interest adverse to that of the infant (*Hopkinson* v. *Roe* (1830), 9 L. J. (o. s.) (CH.) 7; *Gee* v. *Gee* (1863), 12 W. R. 187), or is so connected with a defendant, having an adverse interest to the infant, that it is probable he will not properly protect the infant's interest (*Peyton* v. *Bond*, *Peyton* v. *Robinson* (1827), 1 Sim. 390; *Lander* v. *Ingersoll* (1845), 4 Hare, 596; *Re Burgess*, *Burgess* v. *Bottomley* (1883), 25 Ch. D. 243, C. A.), where he is or ought to be an accounting party in the action (*Hopkinson* v. *Roe*, *supra*), or is insolvent (*Watson* v. *Fraser* (1841), 8 M. & W. 660; *Lees* v. *Smith* (1860), 5 H. & N. 632). But if there is no probability of the infant's interests being injuriously affected (*Bedwin* v. *Asprey* (1841), 11 Sim. 530), a next friend will not be removed merely on account of his relationship to the defendant or to an accounting party in the action (*Bedwin* v. *Asprey*, *supra*; *Sandford* v. *Sandford* (1863), 11 W. R. 336; *Piffard* v. *Beeby* (1866), 14 W. R. 948), or on account of his being clerk to the defendant's solicitor (*Ashley* v. *Allden*, *Jones* v. *Ashley* (1852), 16 Jur. 460; *Lloyd* v. *Davies*, *Lloyd* v. *Banks* (1864), 10 Jur. (N. S.) 1041), or on account of his poverty (*Jones* v. *Evans* (1886), 31 Sol. Jo. 11), or on account of the circumstances under which he was nominated being open to some degree of suspicion (*Smallwood* v. *Rutter* (1851), 9 Hare, 24, 29).

(*b*) *Russell* v. *Sharpe* (1820), 1 Jac. & W. 482; *Gravatt* v. *Tann* (1866), 15 W. R. 83; *Re Birchall*, *Wilson* v. *Birchall* (1880), 16 Ch. D. 41, C. A., *per* JESSEL, M.R., at p. 42. A next friend will be removed if he does not proceed with the action (*Ward* v. *Ward* (1813), 3 Mer. 706) or refuses to appeal (*Du Puy* v. *Welsford* (1880), 28 W. R. 762).

(*c*) *Re Corsellis*, *Lawton* v. *Elwes* (1884), 32 W. R. 965, C. A.

(*d*) *Woolf* v. *Pemberton* (1877), 6 Ch. D. 19, C. A.; *Hutchinson* v. *Norwood* (1885), 31 Ch. D. 237.

benefit of the infant that another next friend should be substituted for him (*e*), and that his proposed successor is a fit and proper person and is not interested in the subject of the proceedings (*f*); and he must give security for the costs up to his retirement if required to do so (*g*).

Death of next friend.

Where a next friend dies, the nearest paternal relative of the infant is entitled to nominate a new next friend (*h*).

Marriage of female next friend.

Where a female next friend marries, a new next friend must be appointed in her place (*i*).

SUB-SECT. 3.—*Interlocutory Proceedings.*

Interlocutory applications.

314. All interlocutory applications on behalf of an infant plaintiff must be made by his next friend (*k*). The next friend can be required to answer interrogatories and to make discovery on oath of documents and allow inspection of documents in an action or matter in which an infant is plaintiff or applicant in the High Court of Justice (*l*) or in a county court (*m*); and can, with the sanction of the court or a judge, consent to any arrangement as to the mode of taking evidence or any other procedure in a cause or matter in which an infant is plaintiff or applicant in the High Court of Justice (*n*) or in a county court (*o*).

Consent.

SUB-SECT. 4.—*Attainment of Full Age during Proceedings.*

Where infant is sole plaintiff or applicant.

315. Where an infant, who is sole plaintiff or applicant in legal proceedings, attains full age while they are pending, he can elect whether the proceedings shall go on or not (*p*). If he elects to continue the proceedings they will thenceforth be conducted in his own name, and he will be liable for the costs of them from the

(*e*) *Melling* v. *Melling* (1819), 4 Madd. 261.

(*f*) *Harrison* v. *Harrison* (1842), 5 Beav. 130.

(*g*) *Witts* v. *Campbell* (1806), 12 Ves. 493; *Davenport* v. *Davenport* (1822), 1 Sim. & St. 101. If this is not done the new next friend will be responsible for the costs previous to his appointment (*Bligh* v. *Tredgett* (1851), 5 De G. & Sm. 74).

(*h*) *Talbot* v. *Talbot* (1874), L. R. 17 Eq. 347. An affidavit of the fitness of the person nominated is not required (*ibid.*).

(*i*) *Crispe* v. *Braddy* (1839), 9 L. J. (CH.) 108; *Jones* v. *Jones* (1869), 17 W. R. 1003; see *Re Somerset* (*Duke*), *Thynne* v. *St. Maur* (1887), 34 Ch. D. 465.

(*k*) *Jones* v. *Lewis* (1847), 1 De G. & Sm. 245. An application adverse to the next friend in the cause must be made by a next friend specially nominated for the purpose (*Cox* v. *Wright* (1863), 32 L. J. (CH.) 770; and see p. 135, *ante*).

(*l*) R. S. C., Ord. 31, r. 29 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 124); and see titles DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 48; HUSBAND AND WIFE, Vol. XVI., p. 526.

(*m*) County Court Rules, Ord. 16, r. 25 (Statutory Rules and Orders Revised, Vol. III., County Court, England, p. 157); and see title COUNTY COURTS, Vol. VIII., p. 513.

(*n*) R. S. C., Ord. 16, r. 21 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 83).

(*o*) County Court Rules, Ord. 3, r. 13 (Statutory Rules and Orders Revised. Vol. III., County Court, England, p. 101).

(*p*) *Brown* v. *Weatherhead* (1844), 4 Hare, 122. After the infant has attained full age, the next friend should take no further steps in the cause, even though only consequential or formal proceedings (*ibid.*). But he cannot be interfered with until proof of the infant's majority has been furnished to the court (*Stone* v. *March* (1610), 1 Bulst. 24; *Almack* v. *Moore* (1878), 2 L. R. Ir. 90).

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commencement (*q*). If he elects to discontinue them, he may obtain an order to dismiss them on payment of the costs from the commencement (*r*); or he may take no steps, in which case the defendant may apply to dismiss the proceedings, but cannot make the infant pay the costs of them (*s*).

Where infant is co-plaintiff.

When an infant is co-plaintiff or co-petitioner with others, he can, on attaining full age, apply to have his name struck out (*t*); but in that case, if his co-plaintiffs or co-petitioners so desire, he may be added as a defendant or respondent to the proceedings (*a*). He cannot, on attaining full age, claim to appear as a plaintiff separately from his co-plaintiffs (*b*).

SUB-SECT. 5.—*Judgment.*

Effect of judgment.

316. An infant plaintiff is as much bound as an adult by a judgment or order in the cause (*c*), even though there may have been irregularities in the conduct of it (*d*), unless there has been fraud (*e*), or gross negligence on the part of his next friend (*f*). But in special circumstances he may be allowed on coming of age to amend his claim or to bring a fresh action (*g*).

SUB-SECT. 6.—*Costs.*

Liability of next friend for costs.

317. An infant plaintiff is not liable personally for the costs of the proceedings, unless after attaining full age he elects to continue the proceedings or obtain an order for their discontinuance (*h*).

(*q*) *Bligh* v. *Tredgett* (1851), 5 De G. & Sm. 74, *per* PARKER, V.-C., at p. 77.

(*r*) *Anon.* (1819), 4 Madd. 461.

(*s*) *Turner* v. *Turner* (1726), 2 Stra. 708. The repudiation of an action or proceeding by the infant relates back to its commencement so as to override all that has been done in it (*Dunn* v. *Dunn* (1855), 7 De G. M. & G. 25, C. A., *per* TURNER, L.J., at p. 29).

(*t*) *Acres* v. *Little* (1834), 7 Sim. 138; *Guy* v. *Guy* (1840), 2 Beav. 460; *Cooke* v. *Fryer* (1841), 4 Beav. 13.

(*a*) *Bicknell* v. *Bicknell* (1863), 32 Beav. 381.

(*b*) *Swift* v. *Grazebrook* (1842), 13 Sim. 185; *Ballard* v. *White* (1843), 2 Hare, 158, 159.

(*c*) *Brook* (*Lord*) v. *Hertford* (*Lord and Lady*) (1729), 2 P. Wms. 518, 519; *Gregory* v. *Molesworth* (1748), 3 Atk. 626, *per* Lord HARDWICKE, L.C., at p. 627; *Wall* v. *Bushby* (1785) 1 Bro. C. C. 484; and see title JUDGMENTS AND ORDERS. Where, upon an action by an infant plaintiff against his employers for damages for personal injury being dismissed, his counsel applied to the judge to assess compensation under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 1 (4), who accordingly awarded such compensation, the plaintiff was held to be thereby estopped from applying for judgment or a new trial in the action (*Neale* v. *Electric and Ordnance Accessories Co., Ltd.*, [1906] 2 K. B. 558, C. A.; see *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. 225, C. A.; *Cribb* v. *Kynoch, Ltd.* (No. 2), [1908] 2 K. B. 551, C. A., *per* BUCKLEY, L.J., at p. 561). As to payment to the Public Trustee of money or damages recovered by or awarded to an infant plaintiff in the King's Bench Division of the High Court, see R. S. C., Ord. 22, r. 15 (Statutory Rules and Orders, 1909, Supreme Court, England, pp. 751, 752; amended by R. S. C., July, 1910 ([1910] W. N., Part II. 293)).

(*d*) *Morison* v. *Morison* (1838), 4 My. & Cr. 215.

(*e*) *Colclough* v. *Bolger* (1816), 4 Dow, 54, H. L.

(*f*) *Re Hoghton, Hoghton* v. *Fiddey* (1874), L. R. 18 Eq. 573, *per* MALINS, V.-C., at pp. 576, 577.

(*g*) *Napier* v. *Effingham* (*Lady*) (1727), 2 P. Wms. 401; *Orphan Board* (*President, etc.*) v. *Van Reenen* (1829), 1 Knapp, 83, P. C.; *Merryweather* v. *Turner* (1845), 9 Jur. 120; *Re Hoghton, Hoghton* v. *Fiddey, supra.*

(*h*) See p. 137, *ante*, and *supra*.

But the defendant is entitled to recover from the next friend his costs of the proceedings if they are dismissed (*i*). The next friend is liable to the solicitor acting on behalf of the infant for the costs incurred by him in the proceedings (*k*).

Recovery of costs from infant's estate.

318. Where the infant is entitled to property, the next friend can recover from that property any costs and damages which he has been ordered to pay, if the action was a proper one and for the infant's benefit (*l*). But he will have to bear the costs personally, if the proceedings were not for the infant's benefit (*m*) or were improperly instituted (*n*). Where costs are allowed to the next friend as against the infant, he may have a charge for them on the infant's property (*o*); and in a proper case takes them as between solicitor and client (*p*), including all just allowances (*q*). But where the proceedings are in respect of the infant's reversionary interest in a fund, the next friend may only be allowed in the first instance to take his costs as between party and party, with liberty to apply for the difference when part of the fund falls into possession (*r*).

(*i*) *Buckly* v. *Buckeridge* (1767), 1 Dick. 395; *Flight* v. *Bolland* (1828), 4 Russ. 298, 301; *Fox* v. *Suwerkrop* (1839), 1 Beav. 583; *Jones* v. *Lewis* (1847), 1 De G. & Sm. 245; *Re Brocklebank, Ex parte Brocklebank* (1877), 6 Ch. D. 358, 360, C. A.; *Caley* v. *Caley* (1877), 25 W. R. 528; *Thomas* v. *Elsum* (1877), 46 L. J. (CH.) 793; *Golds* v. *Kerr*, [1884] W. N. 46; *Re Hicks, Lindon* v. *Hemery*, [1893] W. N. 138; *Catt* v. *Wood*, [1908] 2 K. B. 458, C. A., *per* KENNEDY, L.J., at p. 473; even though the proceedings are instituted under the sanction of the court (*Frank* v. *Mainwaring* (1851), 4 Beav. 37), and though he was made next friend without his authority (*Ward* v. *Ward* (1843), 6 Beav. 251; *Bligh* v. *Tredgett* (1851), 5 De G. & Sm. 74), in which case, however, he may recover the costs from the solicitor who made him next friend (*Ward* v. *Ward*, *supra*, at p. 254; *Bligh* v. *Tredgett*, *supra*, at p. 76). An order against the next friend to pay is final and cannot be questioned on further consideration (*Caley* v. *Caley*, *supra*).

(*k*) *Hawkes* v. *Cottrell* (1858), 3 H. & N. 243; *Re Flower* (*a Solicitor*) (1871), 19 W. R. 578.

(*l*) *Staines* v. *Maddox* (1730), Mos. 319; *Taner* v. *Ivie* (1752), 2 Ves. Sen. 466, *per* Lord HARDWICKE, L.C., at p. 468; *Thompson* v. *Sheppard* (1789), 2 Cox, Eq. Cas. 161; *Mackenzie* v. *Taylor* (1844), 7 Beav. 467; *Cross* v. *Cross* (1845), 8 Beav. 455; *Pritchard* v. *Roberts* (1873), L. R. 17 Eq. 222, *per* HALL, V.-C., at p. 224; *Damant* v. *Hennell* (1886), 33 Ch. D. 224; *Re Burton, Burton* v. *Burton*, [1887] W. N. 160; *Re Aldred, Marshall* v. *Marshall*, [1888] W. N. 82; *Steeden* v. *Walden*, [1910] 2 Ch. 393. The next friend can bring an action against the infant to be indemnified against the costs, and any damages which he has been ordered to pay, as well as his own costs (*Steeden* v. *Walden*, *supra*). A solicitor is entitled to a lien on an infant's property recovered by means of his professional services (*Pritchard* v. *Roberts*, *supra*); see notes (*s*), (*t*), p. 138, *ante*.

(*m*) *Clayton* v. *Clarke* (1861), 3 De G. F. & J. 682, C. A.; *Re Fish, Bennett* v. *Bennett*, [1893] 2 Ch. 413, C. A., *per* LINDLEY, L.J., at p. 422; *Re Hicks, Lindon* v. *Hemery*, *supra*.

(*n*) *Buckly* v. *Buckeridge*, *supra*; *Roddam* v. *Hetherington* (1799), 5 Ves. 91, *per* Lord LOUGHBOROUGH, L.C., at p. 95; *Pearce* v. *Pearce* (1804), 9 Ves. 548; *Flight* v. *Bolland*, *supra*; *Campbell* v. *Campbell* (1837), 2 My. & Cr. 25, 30; *Edgley* v. *Adam* (1869), 31 L. T. 15; *Thomas* v. *Elsum*, *supra*; *Re Fish, Bennett* v. *Bennett*, *supra*, *per* LINDLEY, L.J., at p. 422; *Re Hicks, Lindon* v. *Hemery*, *supra*.

(*o*) *Mandeno* v. *Mandeno* (1853), Kay, Appendix, p. ii.; see *Steeden* v. *Walden*, *supra*. As to such charges, see titles LIEN; MORTGAGE.

(*p*) *Fearns* v. *Young* (1804), 10 Ves. 184; *Damant* v. *Hennell*, *supra*; *Re Slaughter, Walton* v. *Aitchison*, [1907] W. N. 197.

(*q*) *Fearns* v. *Young*, *supra*.

(*r*) *Damant* v. *Hennell*, *supra*; *Re Burton, Burton* v. *Burton*, *supra*; *Re Aldred, Marshall* v. *Marshall*, *supra*.

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When the infant on attaining full age adopts the proceedings, the solicitor is entitled to a charge on his estate for the costs of them (*s*). But where he repudiates the proceedings, the solicitor has no lien for his costs on deeds brought into court in the proceedings (*a*).

Right of solicitor where infant adopts proceedings.

SECT. 2.—*Against Infants.*

SUB-SECT. 1.—*Institution of Proceedings.*

Initial proceedings.

319. An action, petition, or other proceedings may be brought, presented, or instituted against an infant in like manner as against an adult (*b*), and he need not be described in it as an infant (*c*).

Service.

Unless it is otherwise ordered, service of the writ, petition, or other initial proceeding on the father or guardian of the infant, or, if he has none, on the person with whom he resides or under whose care he is, is good service on the infant; but an order may be made that service on the infant himself shall be deemed good service (*d*).

Supplemental proceedings.

Where an infant, a necessary party to proceedings, is born after they have been instituted, he may be ordered to be bound by them, if they are for his benefit (*e*); if not, he may be made defendant to a supplemental action (*f*).

SUB-SECT. 2.—*Guardian ad litem.*

Guardian *ad litem*.

320. An infant defends all proceedings by a guardian *ad litem*, and a person to fill that office must be named before appearance is entered, or any other step is taken on behalf of or against the infant (*g*). The guardian *ad litem* must be a person having no interest in the matters in question in the proceedings adverse to

(*s*) *Baile* v. *Baile* (1872), L. R. 13 Eq. 497; and see titles LIEN; SOLICITORS.

(*a*) *Dunn* v. *Dunn* (1855), 7 De G. M. & G. 25, C. A.

(*b*) Bac. Abr., tit. Infancy and Age (K.); *Wade* v. *Keefe* (1888), 22 L. R. Ir. 154; and see title PRACTICE AND PROCEDURE. Where a female infant, who was a necessary party to proceedings, had not yet received a name, leave was given to describe her as the youngest female child of her father and mother (*Eley* v. *Broughton* (1825), 2 Sim. & St. 188).

(*c*) *Frescobaldi* v. *Kinaston* (1727), 2 Stra. 783; *Wade* v. *Keefe*, *supra*. But the description is proper if the fact is known (Daniell, Chancery Practice, 7th ed., pp. 125, 126). In any case the description forms part of the title of the action after the infant's appearance (Chitty, King's Bench Forms, 13th ed., p. 569).

(*d*) R. S. C., Ord. 9, r. 4 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England. p. 65); County Court Rules, 1903, Ord. 7, r. 13 (Statutory Rules and Orders Revised, Vol. III., County Court, England, p. 116); *Hitch* v. *Wells* (1845), 8 Beav. 576. Where the residence of the parents of the infant could not be discovered, service on the infant, and on the head of the college at the university in which he was residing as an undergraduate, was held sufficient (*Christie* v. *Cameron* (1856), 2 Jur. (N. S.) 635). In *Poney* v. *Hordern* (NORTH, J., in chambers, 25th January, 1897) leave was given to serve an infant in France personally with notice of a writ.

(*e*) *Peter* v. *Thomas-Peter* (1884), 26 Ch. D. 181; *Wicks* v. *Wicks*, [1887] W. N. 15.

(*f*) *Capps* v. *Capps* (1868), 4 Ch. App. 1; *Auster* v. *Haines* (1869), 4 Ch. App. 445; *Peter* v. *Thomas-Peter*, *supra*.

(*g*) Co. Litt. 135 b; *Bird* v. *Orms* (1611), Cro. Jac. 289; *King* v. *Marborough* (1612), Cro. Jac. 303, Ex. Ch.; *Hindmarsh* v. *Chandler* (1817), 7 Taunt. 488;

that of the infant (*h*). Where he is assigned by the court (*i*), he must be a person within the jurisdiction (*k*); and preference is given to an adult and competent person, already a party to the cause, and not having any adverse interest to the infant (*l*), or to a relation, connection, or friend of the family (*m*). It is a matter of course for

Castledine v. *Mundy* (1832), 4 B. & Ad. 90; *Beven* v. *Cheshire* (1834), 3 Dowl. 70; *Carr* v. *Cooper* (1861), 1 B. & S. 230; *Wade* v. *Keefe* (1888), 22 L. R. Ir. 154; R. S. C., Ord. 16, rr. 16, 18, 19 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 82); and see Yearly Practice of the Supreme Court, 1911, pp. 161 *et seq.* This applies to an infant married woman (*Colman* v. *Northcote* (1843), 2 Hare, 147). A solicitor who had entered appearance for an infant defendant, not knowing that he was under age, was held not to be personally liable for costs incurred by the plaintiff in subsequent proceedings which on that account were set aside as irregular (*Wade* v. *Keefe*, *supra*); but the recent decisions as to a solicitor's liability when acting for a lunatic defendant (*Yonge* v. *Toynbee*, [1910] 1 K. B. 215, C. A.), and a non-existent company (*Simmons* v. *Liberal Opinion*, [1911] 1 K. B. 966, C. A.), seem not consistent with this case. In proceedings in the High Court of Justice, other than proceedings relating to probate or letters of administration, no order for the appointment of a guardian *ad litem* is necessary; but the solicitor for the infant who applies to enter an appearance to a writ of summons, or appears on the hearing of a petition, or notice of motion, or summons in a matter, in all cases in which the appointment of a special guardian is not provided for, must make and file an affidavit that the proposed guardian *ad litem* is a proper person, and consents to act as such, and has no interest in the matters in question in the proceedings adverse to that of the infant (R. S. C., Ord. 16, rr. 18, 19, Appendix A, Part II., Form No. 8 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, pp. 82, 286, 287)). Where no appearance to a writ of summons is entered for an infant defendant, the plaintiff, before proceeding further with the action against him, must apply for and obtain an order that a proper person be assigned guardian of the infant, by whom he may appear and defend the action (R. S. C., Ord. 13, r. 1 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, pp. 73, 74). The official solicitor is sometimes appointed guardian *ad litem* in these circumstances (Daniell, Chancery Practice, p. 127; see *Thomas* v. *Thomas* (1843), 7 Beav. 47; *Sheppard* v. *Harris* (1845), 15 L. J. (CH.) 104; *Cookson* v. *Lee* (1846), 15 Sim. 302; *Charlton* v. *West* (1861), 3 De G. F. & J. 156, C. A.). The fact of the infant and his father or guardian being out of the jurisdiction does not dispense with the general obligation imposed by the rule of previous service of notice of the application on them (*Anderson* v. *Stather* (1846), 10 Jur. 383; *O'Brien* v. *Maitland* (1862), 4 De G. F. & J. 331; *White* v. *Duvernay*, [1891] P. 290), except under special circumstances (*Turner* v. *Snowdon* (1864), 2 Drew. & Sm. 265). The six clear days between service of notice and the application mentioned in the rule include a Sunday (*Brewster* v. *Thorpe* (1846), 11 Jur. 6). Even if the infant is of unsound mind, the appointment is made in Chancery (*Pidcock* v. *Boultbee* (1852), 2 De G. M. & G. 898, C. A.).

The practice of the county courts as to the guardian *ad litem* of an infant is regulated by County Court Rules, 1903, Ord. 3, r. 10, Ord. 7, rr. 50—56 (Statutory Rules and Orders Revised, Vol. III., County Court, England, pp. 122 *et seq.*). See title COUNTY COURTS, Vol. VIII., pp. 455, 479.

(*h*) *Smith* v. *Palmer* (1840), 3 Beav. 10; *Drant* v. *Vause* (1843), 2 Y. & C. Ch. Cas. 524; *Leese* v. *Knight* (1862), 8 Jur. (N. S.) 1006; and see note (*g*), p. 140, *ante*.

(*i*) See note (*g*), p. 140, *ante*.

(*k*) —— v. —— (1854), 18 Jur. 770.

(*l*) *Anon.* (1852), 9 Hare, Appendix, p. xxvii.; *Re Taylor*, *Taylor* v. *Taylor*, [1881] W. N. 81.

(*m*) *Foster* v. *Cautley* (1853), 10 Hare, Appendix I., p. xxiv. The office has been assigned to a father not having an adverse interest to the infant (*Jongsma* v. *Pfiel* (1804), 9 Ves. 357; *Fowler* v. *Ward* (1842), 6 Jur. 403), or a father-in-law (*Quarrill* v. *Binmore* (1844), 8 Jur. 1113), or a guardian (*Sandys* v. *Cooper* (1835), 4 L. J. (CH.) 162; *Shuttleworth* v. *Shuttleworth* (1843), 2 Hare, 147). The office cannot be held by the plaintiff's solicitor (*Sheppard* v. *Harris* (1845), 15

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the guardian of the infant's person to be his guardian *ad litem* (*n*); but if the guardian declines to act, the office may be assigned to the official solicitor of the court (*o*).

Removal or death of guardian *ad litem*.

321. A guardian *ad litem* against whom there is good ground for objection, or who acts improperly or against the interests of the infant in the proceedings, may be removed, and another assigned in his place (*p*).

Where a guardian *ad litem* dies during the proceedings, another will be assigned (*q*).

Status.

A guardian *ad litem*, like a next friend (*r*), is not for all purposes a party to the action (*s*). He cannot appear and be heard in person (*t*), but he must answer interrogatories and produce documents on behalf of the infant (*a*). He can, with the sanction of the court, give consent on behalf of the infant to a mode of taking evidence or to any other procedure (*b*).

SUB-SECT. 3.—*Pleading by Infant.*

Statement of defence on behalf of the infant.

322. Where an infant defendant to an action does not put in a defence, the allegations in the statement of claim are not taken to be admitted by him (*c*); and therefore the action cannot be set down as against him on motion for judgment as for default in delivering a defence (*d*), but must be set down for trial as if he had denied the allegations (*e*). But it is generally necessary for him to put in a

L. J. (CH.) 104). The fact of a female guardian *ad litem* not being married must appear on the proceedings (*London and County Banking Co.* v. *Bray*, [1893] W. N. 130).

(*n*) *Sandys* v. *Cooper* (1835), 4 L. J. (CH.) 162, *per* SHADWELL, V.-C.

(*o*) *White* v. *Duvernay*, [1891] P. 290.

(*p*) *Russell* v. *Sharpe* (1820), 1 Jac. & W. 482; *Sandys* v. *Cooper*, *supra*; *Percival* v. *Cross* (1882), 7 P. D. 234; *Re Somerset* (*Duke*), *Thynne* v. *St. Maur* (1887), 34 Ch. D. 465.

(*q*) *Drant* v. *Vause* (1843), 2 Y. & C. Ch. Cas. 524.

(*r*) See p. 135, *ante*.

(*s*) *Ingram* v. *Little* (1883), 11 Q. B. D. 251, *per* Lord COLERIDGE, C.J., at p. 253.

(*t*) *Murray* v. *Sitwell*, [1902] W. N. 119; *Re Berry*, *Berry* v. *Berry*, [1903] W. N. 125.

(*a*) R. S. C., Ord. 31, r. 29 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 124); County Court Rules, 1903, Ord. 16, r. 25 (Statutory Rules and Orders Revised, Vol. III., County Court, England, p. 157). See also titles COUNTY COURTS, Vol. VIII., p. 513; DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 48; HUSBAND AND WIFE, Vol. XVI., p. 526. As to whether an affidavit of documents and discovery can be obtained from an infant respondent in a divorce suit, see *Redfern* v. *Redfern*, [1891] P. 139, C. A.

(*b*) R. S. C., Ord. 16, r. 21 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 83); County Court Rules, 1903, Ord. 3, r. 13 (Statutory Rules and Orders Revised, Vol. III., County Court, England, p. 101). But no order by the court seems necessary (*Fryer* v. *Wiseman* (1876), 24 W. R. 205); *Knatchbull* v. *Fowle* (1876), 1 Ch. D. 604; *Piggott* v. *Toogood*, [1904 W. N. 130). See also *Tillotson* v. *Hargrave* (1818), 3 Madd. 495; *Pisani* v *A.-G. for Gibraltar* (1874), L. R. 5 P. C. 516).

(*c*) R. S. C., Ord. 19, r. 13 (Statutory Rules and Orders Revised, Vol. XII. Supreme Court, England, p. 95); and see title PLEADING.

(*d*) See R. S. C., Ord. 27, r. 11 (*ibid.*, p. 112).

(*e*) *Ellis* v. *Robbins* (1881), 50 L. J. (CH.) 512; *National and Provincial Bank* v. *Evans* (1881), 30 W. R. 177. But in a simple case judgment may be obtained on motion for judgment upon an affidavit verifying the statement of claim (*Re Fitzwater*, *Fitzwater* v. *Waterhouse* (1882), 52 L. J. (CH.) 83; *Gardner* v. *Tapling*

defence in order to plead his infancy, or to allege other matters which are not put in issue by the plaintiff's allegations (*f*).

SUB-SECT. 4.—*Attainment of Full Age during Proceedings.*

Right of infant on attaining full age.

323. When an infant attains full age during the proceedings, he is entitled to put in a new defence (*g*); but, if he takes no steps within a reasonable time after coming of age, he will be bound by what has been done during his infancy (*h*).

SUB-SECT. 5.—*Judgment.*

Judgment generally binding.

324. A judgment in an action is as binding against an infant defendant as it is against an adult (*i*); but if it was obtained on the footing of his being of age, it is in the discretion of the court to set it aside (*k*). He may, however, even while an infant, bring another action to impeach the judgment on the ground of fraud or collusion (*l*).

Judgment of foreclosure.

325. Where a judgment of foreclosure is given against an infant, he is usually allowed six months after he attains full age to show cause against it (*m*). But this is not allowed where he is merely a trustee (*n*), or where the mortgage is under the Debts Recovery Acts, 1830, 1839, and 1848 (*o*), and judgment will be given against him for immediate foreclosure absolute in a case where to do so is clearly for the benefit of the infant (*p*).

Injunction.

326. An injunction may be granted against an infant (*q*).

(1885), 33 W. R. 473; *Cheek* v. *Cheek*, [1910] W. N. 87; and see *Willis* v. *Willis* (1889), 61 L. T. 610); and evidence has been altogether dispensed with where the inquiries directed by the judgment would sufficiently protect the infant's interests (*Ripley* v. *Sawyer* (1886), 31 Ch. D. 494).

(*f*) *Holden* v. *Hearn* (1839), 1 Beav. 445, *per* Lord LANGDALE, M.R., at p. 455; *Lane* v. *Hardwicke* (1846), 9 Beav. 148.

(*g*) *Bennett* v. *Lee* (1743), 2 Atk. 529, *per* Lord HARDWICKE, L.C., at p. 531; *Savage* v. *Carroll* (1811), 1 Ball & B. 548, *per* Lord MANNERS, L.C., at pp. 551, 553; *Kelsall* v. *Kelsall* (1834), 2 My. & K. 409; *Malone* v. *Malone* (1841), 8 Cl. & Fin. 179, H. L., *per* Lord COTTENHAM, L.C., at p. 206.

(*h*) *Cecil* v. *Salisbury* (*Earl*) (1691), 2 Vern. 224; *Morris* v. *Morris* (1846), 11 Jur. 260; *Monypenny* v. *Dering* (1859), 4 De G. & J. 175.

(*i*) *Sheffield* v. *Buckingham* (*Duchess*) (1739), West *temp.* Hard. 682; *Gregory* v. *Molesworth* (1748), 3 Atk. 626, 627; *Lightburne* v. *Swift* (1812), 2 Ball & B. 207, *per* Lord MANNERS, L.C., at p. 213; *Henry* v. *Archibald* (1871), 5 I. R. Eq. 559, *per* SULLIVAN, M.R., at p. 563; and see title JUDGMENTS AND ORDERS.

(*k*) *Henry* v. *Archibald*, *supra*, at p. 563; *Furnival* v. *Brooke* (1883), 49 L. T. 134.

(*l*) *Richmond* v. *Tayleur* (1721), 1 P. Wms. 734, 737; *Trefusis* v. *Cotton* (1730), Mos. 306, 308; *Carew* v. *Johnstone* (1805), 2 Sch. & Lef. 280, 292. It may be prudent to obtain the previous leave of the court (*Re Hoghton*, *Hoghton* v. *Fiddey* (1874), L. R. 18 Eq. 573, *per* MALINS, V.-C., at p. 577).

(*m*) *Mallack* v. *Galton* (1735), 3 P. Wms. 352; *Williamson* v. *Gordon* (1812), 19 Ves. 114; *Price* v. *Carver* (1837), 3 My. & Cr. 157; *Newbury* v. *Marten* (1851), 15 Jur. 166; *Gray* v. *Bell* (1882), 46 L. T. 521; *Mellor* v. *Porter* (1883), 25 Ch. D. 158. The infant cannot, on showing cause, redeem, or travel into the account, but can only show error in the decree (*Mallack* v. *Galton*, *supra*; *Williamson* v. *Gordon*, *supra*; *Kelsall* v. *Kelsall* (1834), 2 My. & K. 409). As to foreclosure generally, see title MORTGAGE.

(*n*) *Foster* v. *Parker* (1878), 8 Ch. D. 147.

(*o*) 11 Geo. 4 & 1 Will. 4, c. 47; 2 & 3 Vict. c. 60; 11 & 12 Vict. c. 87; see pp. 81, 82, *ante*; *Holme* v. *Williams* (1839), 8 Sim. 557.

(*p*) *Croxon* v. *Lever* (1863), 12 W. R. 237; *Bennett* v. *Harfoot* (1871), 19 W. R. 428; *Wolverhampton and Staffordshire Banking Co.* v. *George* (1883), 24 Ch. D. 707; and see title MORTGAGE.

(*q*) *Lemprière* v. *Lange* (1879), 12 Ch. D. 675; *De Francesco* v. *Barnum* (1889),

SECT. 2. Against Infants.

SUB-SECT. 6.—*Costs.*

Liability of infant for costs.

327. An infant defendant is not usually ordered to pay costs (*r*) unless he has been guilty of fraud (*s*). But the costs of the unsuccessful defence of an infant or his general costs of the proceedings may be ordered to be paid out of property belonging to him over which the court has jurisdiction (*t*).

Liability of guardian *ad litem*.

A guardian *ad litem* is not liable to pay the costs of an unsuccessful defence, unless he has been guilty of gross misconduct (*a*).

Costs of official guardian *ad litem*.

328. Where one of the solicitors of the Supreme Court is assigned by the court to be guardian *ad litem* of an infant, his costs of performing the duties of the office may be directed to be borne and paid by all or any of the parties to the proceedings or out of a fund in court in which the infant is interested; and directions may be given as to the repayment or allowance of such costs (*b*).

Payment of costs of infant defendant.

The costs of an infant defendant, who has been made a party to proceedings without any action or fault on his part, will be ordered to be provided for or paid by the plaintiff (*c*), who, however, in a proper case, may be allowed to add them to his own costs of the proceedings (*d*).

SECT. 3.—*In the Probate, Divorce, and Admiralty Division of the High Court.*

Guardian on behalf of infant.

329. A minor, that is to say, an infant above the age of seven years (*e*), may elect a guardian for the purpose of carrying on, defending, or intervening in a suit relating to a will or letters of administration, without having such guardian assigned to him (*f*). But where an infant under the age of seven years is to carry on, defend, or intervene in any such suit, a guardian is assigned to him for the purpose by the judge or a registrar of the court (*g*).

43 Ch. D. 165; *Evans* v. *Ware*, [1892] 3 Ch. 502; *Woolf* v. *Woolf*, [1899] 1 Ch. 343; *Merriott* v. *Martin* (1899), 43 Sol. Jo. 717; *Gadd* v. *Thompson*, [1911] 1 K. B. 304; and see pp. 72, 73, *ante*. But as to not granting an injunction where specific performance cannot be obtained, see *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. 683, C. A. As to injunctions generally, see title INJUNCTION, pp. 197 *et seq.*, *post*.

(*r*) *Turner* v. *Turner* (1726), 2 Stra. 708, 710; *Elsey* v. *Cox* (1858), 26 Beav. 95.

(*s*) *Chubb* v. *Griffiths* (1865), 35 Beav. 127; *Lemprière* v. *Lange* (1879), 12 Ch. D. 675, 679; *Woolf* v. *Woolf*, *supra*.

(*t*) *Orford* (*Earl*) v. *Churchill* (1814), 3 Ves. & B. 59, 71; *Mandeno* v. *Mandeno* (1853), Kay, Appendix, p. ii. The plaintiff may be directed to pay them and to recover them out of the infant's property (*Robinson* v. *Aston* (1845), 9 Jur. 224).

(*a*) *Morgan* v. *Morgan* (1865), 11 Jur. (N. S.) 233; *Vivian* v. *Kennelly* (1890), 63 L. T. 778.

(*b*) R. S. C., Ord. 65, r. 13 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 249). The costs will not be taxed as between solicitor and client unless specially ordered (*Eady* v. *Elsdon*, [1901] 2 K. B. 460, C. A.; *Goatly* v. *Jones*, [1907] W. N. 161).

(*c*) *Goldsmith* v. *Russell* (1855), 5 De G. M. & G. 547, 556; *Fraser* v. *Thompson* (1859), 4 De G. & J. 659, 663, C. A.; *Short* v. *Ridge*, [1876] W. N. 47, 48.

(*d*) *Fraser* v. *Thompson*, *supra*, at p. 663.

(*e*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 197; and p. 44, *ante*.

(*f*) Probate, Contentious Rules, 1862, r. 74 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 693).

(*g*) *Ibid.*; Probate, Non-Contentious Rules, 1862, r. 34 (Statutory Rules and

SECT. 4. Compromise on behalf of Infants.

SECT. 4.—*Compromise on behalf of Infants.*

330. The compromise of an action, to which an infant is a party, and which affects his interests, cannot be effected without the sanction of the court in which the action is pending (*h*); but the court has full power to sanction such compromise (*i*). In exercising this power the court will consider whether or not the compromise will be beneficial to the infant (*k*); but it cannot compel a compromise (*l*), and will not sanction a compromise against the opinion of the infant's next friend or guardian *ad litem* in the action (*m*), nor can it do so where adults in the same interest insist on their strict rights (*n*). Before sanctioning a compromise it is the practice of the court to require an affidavit by the solicitor to the infant, that he believes the compromise to be beneficial to the infant and an opinion by his counsel to the same effect (*o*). In exercising its power on an infant's behalf, the court can sanction a compromise of proceedings against trustees to recover a trust fund which has been lost (*p*), and can deal with the property of the infant so as to promote a family arrangement (*q*); and may charge the infant's estate (*r*), and change a contingent interest into an indefeasible vested interest (*s*).

Compromise of action to which infant is party.

When a compromise has been sanctioned by the court it will only be set aside on the same strong grounds of fraud as would justify the setting aside of a compromise between adults (*a*).

Setting aside a compromise.

Orders Revised, Vol. XII., Supreme Court, England, p. 763). As to the practice in matrimonial causes, see title HUSBAND and WIFE, Vol. XVI., p. 504.

(*h*) *Hargrave* v. *Hargrave* (1850), 12 Beav. 408; *Gray* v. *Paull* (1877), 25 W. R. 874. As to causes or matters in the King's Bench Division of the High Court in which is a claim for money or damages by, or on behalf of, an infant, see R. S. C., Ord. 22, r. 15 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 106).

(*i*) *Doe* d. *Miller* v. *Noden* (1797), 2 Esp. 530; *Brooke* v. *Mostyn* (*Lord*) (1864), 2 De G. J. & Sm. 373, C. A., *per* TURNER, L.J., at p. 415; *Rhodes* v. *Swithenbank* (1889), 22 Q. B. D. 577, C. A. For form of agreement to compromise, see Encyclopædia of Forms and Precedents, Vol. VI., p. 553. As to election by the court on behalf of an infant, see p. 80, *ante*. As to an order of court referring to arbitration a question in which an infant is interested, see Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14; and title ARBITRATION, Vol. I., p. 442.

(*k*) *Hargrave* v. *Hargrave*, *supra*, at p. 411; *Brooke* v. *Mostyn* (*Lord*), *supra*, at p. 415; *Micholls* v. *Corbett* (1866), 34 Beav. 376, 380; *Re Wells*, *Boyer* v. *Maclean*, [1903] 1 Ch. 848, *per* FARWELL, J., at p. 853; and see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 177; FAMILY ARRANGEMENTS, Vol. XIV., p. 546. The court will not sanction a compromise which is in the interest of the next friend, and not of the infant (*Rhodes* v. *Swithenbank*, *supra*, at pp. 578, 579; *Blair* v. *Crawford*, [1906] 1 I. R. 578, C. A., *per* PALLES, C.B., at p. 587).

(*l*) *Re Birchall*, *Wilson* v. *Birchall* (1880), 16 Ch. D. 41, C. A.

(*m*) *Ibid.*, at pp. 42, 43.

(*n*) *Norton* v. *Steinkopf* (1853), Kay, 45, *per* PAGE WOOD, V.-C., at p. 49.

(*o*) *Re Birchall*, *Wilson* v. *Birchall*, *supra*, at p. 43.

(*p*) *Hopgood* v. *Parkin* (1870), L. R. 11 Eq. 74, 80; *Maclaren* v. *Stainton* (1871), L. R. 11 Eq. 382, 389, 390.

(*q*) *Micholls* v. *Corbett*, *supra*. As to family arrangements, see title FAMILY ARRANGEMENTS, Vol. XIV., pp. 539 *et seq.*

(*r*) *Chetwynd* v. *Fleetwood* (1742), 1 Bro. Parl. Cas. 300.

(*s*) *Re Wells*, *Boyer* v. *Maclean*, [1903] 1 Ch. 848, *per* FARWELL, J. (differing from *Peto* v. *Gardner* (1843), 2 Y. & C. Ch. Cas. 312, and *Day* v. *Day* (1845) 9 Jur. 785).

(*a*) *Brooke* v. *Mostyn* (*Lord*), *supra*, at pp. 415 *et seq.*; *Fadelle* v. *Bernard* (1871), 19 W. R. 555.

SECT. 4. Compromise on behalf of Infants.

A party to proceedings who agrees to a certain course being taken, knowing that the other parties are infants, cannot afterwards object that his consent does not bind him because the other parties, being infants, could not consent (*b*).

Consent of other party.

SECT. 5.—*Wards of Court.*

Wards of court.

331. A ward of court is an infant respecting whose person or property an action, or other proceeding, has been instituted in the Chancery Division of the High Court (*c*). The court, beyond its general jurisdiction over all infants (*d*), exercises a special jurisdiction and control over a ward of court (*e*).

In matrimonial causes.

In a proceeding for obtaining a judicial separation, or a decree of nullity of marriage, or for dissolving a marriage, the High Court

(*b*) *Pisani* v. *A.-G. for Gibraltar* (1874), L. R. 5 P. C. 516.

(*c*) An infant has been held to become a ward of court by the appointment of a guardian for him by the court (*Stuart* v. *Bute* (*Marquis*), *Stuart* v. *Moore* (1861), 9 H. L. Cas. 440, 442, 451; *Brown* v. *Collins* (1883), 25 Ch. D. 56, 61); or without a change of guardian by an order that he shall become a ward of court (*Re M'Cullochs, Minors* (1844), 6 I. Eq. R. 393); or by an order that the infant's mother, instead of being appointed his guardian, shall have reasonable access to him (*De Pereda* v. *De Mancha* (1881), 19 Ch. D. 451, 455, 456); or by the mere fact of his being plaintiff in an action in the Chancery Division of the High Court (*Pendleton* v. *Mackrory* (1790), 2 Dick. 736; *Johnstone* v. *Beattie* (1843), 10 Cl. & Fin. 42, H. L., *per* Lord LYNDHURST, L.C., at pp. 84, 85; *Gynn* v. *Gilbard* (1860), 1 Drew. & Sm. 356, 357); or by the settlement of a small sum of money on him followed by an action to administer the trusts of the settlement (*Hope* v. *Hope* (1854), 4 De G. M. & G. 328, 332; *Re Race* (*Alicia*), *an Infant* (1857), cited in *Gurney* v. *Gurney* (1863), 1 Hem. & M. 413, 420, n. (a); *Dawson* v. *Thomson* (1865), 12 L. T. 178; *Re H.'s Settlement, H.* v. *H.*, [1909] 2 Ch. 260); or by payment into court by trustees under the Trustee Relief Acts, 1847 and 1849 (10 & 11 Vict. c. 96 and 12 & 13 Vict. c. 74) (now replaced by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42) of money or securities in which the infant is interested (*Re Hodge's Settlement* (1857), 3 K. & J. 213, 219, C. A.; *Re Tweedale's Settlement* (1859), John. 109; *Re Lloyd's Trusts, Ex parte Collins* (1868), 2 I. R. Eq. 507; *Re Benand* (1868), 16 W. R. 538); or by a simple order for maintenance made on a summons in chambers (*Re Graham* (1870), L. R. 10 Eq. 530); or by having a fund carried to his account, or to an account in which he was included, in an action to which he was not a party (*De Pereda* v. *De Mancha, supra, per* HALL, V.-C., at p. 455); but this was questioned by KAY, J., in *Brown* v. *Collins, supra*, at p. 60. An infant has been held not to become a ward of court by payment into court by executors under the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 32 (now replaced by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42), of a legacy bequeathed to him (*Re Hillary* (1865), 2 Drew. & Sm. 461); nor by payment into court under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), of the purchase-money of his land taken by a railway company (*Re Wilts, Somerset and Weymouth Rail. Co., Ex parte Brewer* (1865), 2 Drew. & Sm. 552); nor by an application to the court under the Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), to sanction a settlement on his marriage (*Re Dalton* (1856), 6 De G. M. & G. 201, *per* Lord CRANWORTH, L.C., at p. 204). An infant alien can be made a ward of court, if domiciled and resident in this country, but not otherwise (*Brown* v. *Collins, supra*).

(*d*) See pp. 47, 125, *ante*. In one sense all British subjects who are infants are wards of court, because they are subject to the paternal jurisdiction which is entrusted to the court (*Brown* v. *Collins, supra, per* KAY, J., at p. 60).

(*e*) *Ex parte Whitfield* (1742), 2 Atk. 315; *Clayton* v. *Clarke* (1861), 7 Jur. (N. S.) 562, 563, C. A. The jurisdiction continues although the infant becomes of unsound mind (*Vane* v. *Vane* (1876), 2 Ch. D. 124; *Re Edwards* (1879), 10 Ch. D. 605, C. A.).

may, if it thinks fit, either in its final decree, or by a previous or subsequent order, direct proper proceedings to be taken for making the children of the parents whose marriage is the subject of the proceeding, wards of court (*f*).

Residence.

332. The court will not allow one of its wards to be removed out of its jurisdiction (*g*), even by the father (*h*), unless satisfied that the removal is for the benefit of the ward (*i*), and will order a ward who has been removed without leave to be brought back (*k*). The removal of a ward of court, without the leave of the court, either out of the country, or out of the proper custody, is a contempt of court (*l*). Any person who can give information respecting it will be examined (*m*); and a solicitor, who has any knowledge on the subject, cannot withhold it from the court on the ground of privilege (*n*). The restoration of the ward can be enforced by *habeas corpus* (*o*) or by an order of attachment, or committal, or by the intervention of an officer of the court (*p*).

Education.

333. The education of a ward of court is under the control of the court, and a guardian should take the directions of the court in reference to it (*q*). The court will decide in what religion a

(*f*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 35; Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 4. But an order of the Probate, Divorce, and Admiralty Division under those provisions with respect to the custody, maintenance, or education of the children does not make them wards of court (*Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A. *per* COTTON, L.J., at p. 174); and see also title HUSBAND AND WIFE, Vol. XVI., p. 577.

(*g*) *Foster* v. *Denny* (1677), 2 Cas. in Ch. 237; *Mountstuart* v. *Mountstuart* (1801), 6 Ves. 363; *De Manneville* v. *De Manneville* (1804), 10 Ves. 52, *per* Lord ELDON, L.C., at p. 56; *Campbell* v. *Mackay* (1837), 2 My. & Cr. 31; *Re Thomas* (1853), 22 L. J. (CH.) 1075; *Rochford* v. *Hackman* (1854), Kay, 308; *Dawson* v. *Jay* (1854), 3 De G. M. & G. 764, C. A.; *Hope* v. *Hope* (1854), 4 De G. M. & G. 328.

(*h*) *De Manneville* v. *De Manneville, supra.*

(*i*) *Lethem* v. *Hall* (1834), 7 Sim. 141; *Campbell* v. *Mackay, supra*; *Wyndham* v. *Ennismore* (*Lord*) (1837), 1 Keen, 467; *Clogstoun* v. *Walcott* (1845), 9 Jur. 649; *Harrison* v. *Goodall* (1852), cited in *Rochford* v. *Hackman, supra*, at p. 310, n.; *Re Thomas, supra*; *Dawson* v. *Jay, supra, per* Lord CRANWORTH, L.C., at p. 771; *Hart* v. *Tribe* (1854), 19 Beav. 149, 153; *Re Medley, a Minor* (1871), 6 I. R. Eq. 339; *Re Callaghan, Elliott* v. *Lambert* (1884), 28 Ch. D. 186, C. A. Where permission is given to infants to go on a visit abroad, security or an undertaking is generally required for their return to this country within a limited time, and sometimes also for their not marrying without the leave of the court (*Jeffrys* v. *Vanteswarstwarth* (1740), Barn. (CH.) 141, 144; *Biggs* v. *Terry* (1836), 1 My. & Cr. 675; *Talbot* v. *Shrewsbury* (*Earl*), *Doyle* v. *Wright* (1840), 4 My. & Cr. 672, 677).

(*k*) *Foster* v. *Denny, supra*; *Hope* v. *Hope, supra.*

(*l*) *Hockly* v. *Lukin* (1762), 1 Dick. 353; *Wellesley's* (*Long*) *Case* (1831), 2 Russ. & M. 639; *Harrison* v. *Goodall, supra.* See also title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 292.

(*m*) *Rosenberg* v. *Lindo* (1883), 48 L. T. 478.

(*n*) *Ramsbotham* v. *Senior* (1869), L. R. 8 Eq. 575; *Burton* v. *Darnley* (*Earl*) (1869), cited in *Ramsbotham* v. *Senior, supra*, at p. 576, n.

(*o*) *Bond* v. *Roberts* (1843), 13 Sim. 400.

(*p*) *G.* v. *L.*, [1891] 3 Ch. 126.

(*q*) *Creuze* v. *Hunter* (1790), 2 Cox, Eq. Cas. 242; *Campbell* v. *Mackay, supra*, at p. 38; *Wyndham* v. *Ennismore* (*Lord*), *supra*; *Re Fynn* (1848),

SECT. 5. Wards of Court.

ward of court ought, in all the circumstances of the case, to be brought up (*r*).

Marriage.

334. A ward of court cannot marry without the consent of the court (*s*); and marriage, or connivance at marriage, with a ward of court, without such consent, is a contempt of court, and will be severely punished (*t*). The ward himself may be committed to prison for marrying without such consent (*u*). The fact of the marriage being actually invalid makes no difference in the contempt (*a*); and, if it is invalid, the court will, in its discretion, either direct steps to be taken to have it formally declared void, or will order a marriage to be validly solemnised (*b*). Where the consent of the court is not given to a contemplated marriage of a ward of court, an injunction will be granted to restrain it, both against the other intended party (*c*) and the parent of such party (*d*), and against a guardian who is permitting the marriage (*e*); and the other party will be restrained from communicating with the ward, either personally, or by letter (*f*).

Where a ward of court is about to be married, the court will insist upon a proper settlement being made of his or her fortune so far as the other party can make such a settlement (*g*), but cannot compel

2 De G. & Sm. 457; *Kay* v. *Johnston* (1856), 21 Beav. 536; *Re Medley, a Minor* (1871), 6 I. R. Eq. 339.

(*r*) *Talbot* v. *Shrewsbury* (*Earl*), *Doyle* v. *Wright* (1840), 4 My. & Cr. 672; *Re Lyons* (*an Infant*) (1869), 22 L. T. 770. The court will restrain by injunction an attempt to make the ward change his religion (*Iredell* v. *Iredell* (1885), 1 T. L. R. 260).

(*s*) *Eyre* v. *Shaftsbury* (*Countess*) (1723), 2 P. Wms. 103, 112; *Jeffrys* v. *Vanteswarstwarth* (1740), Barn. (CH.) 141, 144; *Tombes* v. *Elers* (1747), 1 Dick. 88. The consent of the father is not sufficient (*Gordon* (*Lord W.*) v. *Irwin* (*Viscountess*) (1781), 4 Bro. Parl. Cas. 355; *Wellesley* v. *Beaufort* (*Duke*) (1827), 2 Russ. 1, *per* Lord ELDON, L.C., at p. 29).

(*t*) *Eyre* v. *Shaftsbury* (*Countess*), *supra*, at pp. 110, 112; *Herbert's Case* (1731), 3 P. Wms. 116; *More* v. *More* (1741), 2 Atk. 157; *Harford* v. *Morris* (1776), 2 Hag. Con. 423; *Stevens* v. *Savage* (1790), 1 Ves. 154; *Priestley* v. *Lamb* (1801), 6 Ves. 421; *Salles* v. *Savignon* (1801), 6 Ves. 572; *Millet* v. *Rowse* (1802), 7 Ves. 419; *Bathurst* v. *Murray* (1802), 8 Ves. 74; *Wade* v. *Broughton* (1814), 3 Ves. & B. 172; *Richardson* v. *Merrifield* (1850), 4 De G. & Sm. 161; *Re Sampson and Wall, Infants* (1884), 25 Ch. D. 482, C. A.; *Re H.'s Settlement, H.* v. *H.*, [1909] 2 Ch. 260. See title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 292.

(*u*) *Re Leigh, Leigh* v. *Leigh* (1888), 40 Ch. D. 290, C. A., *per* COTTON, L.J., at p. 294; *Re H.'s Settlement, H.* v. *H.*, *supra*.

(*a*) The endeavour to marry is a contempt (*Warter* v. *Yorke* (1815), 19 Ves. 451, *per* Lord ELDON, L.C., at p. 453).

(*b*) *Warter* v. *Yorke*, *supra*, at p. 454; *Kent* v. *Burgess* (1840), 11 Sim. 361, 363; *Re Murray, a Minor* (1842), 3 Dr. & War. 83, 84.

(*c*) *Raymond's* (*Lord*) *Case* (1734), Cas. *temp.* Talb. 58; *Smith* v. *Smith* (1746), 3 Atk. 304; *Pearce* v. *Crutchfield* (1807), 14 Ves. 206.

(*d*) *Raymond's* (*Lord*) *Case*, *supra*, at p. 60.

(*e*) *Goodall* v. *Harris* (1729), 2 P. Wms. 561; *Shipbrook* (*Lord*) v. *Hinchinbrook* (*Lord*) (1778), 2 Dick. 547, 548.

(*f*) *Smith* v. *Smith*, *supra*; *Beard* v. *Travers* (1749), 1 Ves. Sen. 313; *Shipbrook* (*Lord*) v. *Hinchinbrook* (*Lord*), *supra*; *Pearce* v. *Crutchfield*, *supra*; *Scot* v. *Padwick* (1888), 4 T. L. R. 569.

(*g*) *Stackpole* v. *Beaumont* (1796), 3 Ves. 88, 98; *Millet* v. *Rowse*, *supra*; *Ball* v. *Coutts* (1812), 1 Ves. & B. 292, *per* Lord ELDON, L.C., at p. 300; *Re Donne* (1825), 2 Mol. 490; *Wade* v. *Hopkinson* (1855), 19 Beav. 613. The

the ward to execute a settlement (*h*). In the case of a female ward the court will so far as possible exclude the intended husband from an interest in her property or will limit his interest in it (*i*).

The court has no jurisdiction over a ward after he or she has attained full age, and cannot interfere with the marriage of a former ward, or compel a settlement of his or her property, unless the marriage involves a contempt of court (*k*).

Legal proceedings on behalf of wards of court.

335. The sanction of the Chancery Division of the High Court of Justice is required for the institution of legal proceedings on behalf of an infant whose property is already the subject of pending proceedings, or who is otherwise a ward of court, and will only be given if the court is satisfied that the proceedings will be for his benefit (*l*).

court will refuse to give any directions for payment of the dividends on the wife's property until a settlement has been executed (*Cator* v. *Mason* (1854), 2 W. R. 667). In the case of the wife's property the court will generally insist upon provision being made for children of a future marriage (*Wells* v. *Price* (1800), 5 Ves. 398; *Halsey* v. *Halsey* (1804), 9 Ves. 471; *Long* v. *Long* (1824), 2 Sim. & St. 119; *Rudge* v. *Winnall* (1848), 11 Beav. 98) by giving the wife a power of appointing part of the settled fund to such children (*Bathurst* v. *Murray* (1802), 8 Ves. 74; *Birkett* v. *Hibbert* (1834), 3 My. & K. 227), and will also give her power to make provision for a future husband (*Winch* v. *James* (1798), 4 Ves. 386). The costs of the settlement of the wife's property will not be paid out of her property (*De Stacpoole* v. *De Stacpoole*, *De Stacpoole* v. *Stapleton*, *Re De Stacpoole*, *De Stacpoole* v. *Seymour* (1887), 37 Ch. D. 139).

(*h*) *Martin* v. *Foster* (1855), 7 De G. M. & G. 98, C. A.; *Re Sampson and Wall*, *Infants* (1884), 25 Ch. D. 482, 498, 499, C. A.; *Buckmaster* v. *Buckmaster* (1887), 35 Ch. D. 21, C. A., affirmed *sub nom. Seaton* v. *Seaton* (1888), 13 App. Cas. 61; *Re Leigh*, *Leigh* v. *Leigh* (1888), 4 Ch. D. 290, C. A.

(*i*) *Martin* v. *Foster*, *supra*. Where the marriage takes place without the consent of the court the husband will be excluded altogether (*Chassaing* v. *Parsonage* (1799), 5 Ves. 15; *Millet* v. *Rowse* (1802), 7 Ves. 419; *Kent* v. *Burgess*, *Winkworth* v. *Burgess* (1841), 11 Sim. 361, 378; *Re Murray*, *a Minor* (1842), 3 Dr. & War. 83, *per* SUGDEN, L.C., at p. 86; *Blair* v. *Cuthbertson* (1849), 13 Jur. 442; *Wade* v. *Hopkinson* (1855), 19 Beav. 613, *per* ROMILLY, M.R., at p. 619); but see *Re Sampson and Wall*, *Infants*, *supra*. A male ward cannot be compelled to execute a settlement excluding a wife, whom he has married without the consent of the court, from all interest in his property (*Re Murray*, *a Minor*, *supra*).

(*k*) *Ball* v. *Coutts* (1812), 1 Ves. & B. 292; *Long* v. *Long*, *supra*; *Money* v. *Money* (1855), 3 Drew. 256; *Longbottom* v. *Pearce* (1858), cited in *Biddles* v. *Jackson* (1859), 3 De G. & J. 544, 545, n., C. A.; *White* v. *Herrick* (1869), 4 Ch. App. 345; *Sams* v. *Cronin*, *Ex parte Reed* (1873), 29 L. T. 885; *Sumner* v. *Kingscote* (1885), 1 T. L. R. 351; *Bolton* v. *Bolton*, [1891] 3 Ch. 270, C. A. The court cannot interfere with the marriage of an infant who is not a ward of court or compel a settlement of his property (*Re Potter* (1869), L. R. 7 Eq. 484).

(*l*) *Harrison* v. *Richards* (1866), 1 Ch. App. 473.

Part IX.—Employment of Children and Young Persons (*m*).

SECT. 1. General Statutory Restrictions and Local Bye-laws.

SECT. 1.—*General Statutory Restrictions and Local Bye-laws.*

Employment of Children Act, 1903.

336. Any local authority (*n*) may make bye-laws regulating the age below which, the hours between which, and the number of daily and weekly hours beyond which, the employment (*o*) of children (*p*) is illegal, or prohibiting or permitting subject to conditions, the employment of children in any specified occupation (*q*).

Street trading.

Any local authority may similarly, by bye-laws, regulate street trading (*r*) by persons under the age of sixteen, prohibiting such trading except subject to specified conditions as to age, sex, or otherwise, or subject to the holding of a licence granted by the local authority (*s*).

General restrictions on employment of children.

337. The employment of children (*t*) between the hours of 9 p.m. and 6 a.m. is illegal generally, but a local authority may by bye-laws vary these hours either generally or for any specified occupation (*u*).

A child may not be employed (1) if under eleven years of age in street trading (*a*); (2) if a "half timer" in a factory

(*m*) As to employment in agricultural gangs, see title AGRICULTURE, Vol. I., p. 276.

(*n*) The expression "local authority" includes the mayor, aldermen, and commons in council of the City of London, municipal borough councils, urban district councils, and county councils (Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 13). As to local authorities generally, see title LOCAL GOVERNMENT.

(*o*) See title FACTORIES AND SHOPS, Vol. XIV., p. 487, note (*k*).

(*p*) *I.e.*, persons under the age of fourteen years (Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 13; and compare p. 44, *ante*).

(*q*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 1. Bye-laws made under this Act require confirmation by the Secretary of State. Objections to them will be considered by the Secretary of State, and a local inquiry may be ordered to consider the bye-law or any objections. Bye-laws may be made to apply either to the whole of the area of the local authority or to any specified part. Those made by a county council are not effective within any borough or urban district the council of which is constituted a local authority under this Act (*ibid.*, s. 4). Bye-laws made under this Act do not apply to any child above twelve employed in pursuance of the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), or the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), so far as regards that employment (Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 9); see also p. 154, *post*.

(*r*) "Street trading" includes the hawking of newspapers, matches, flowers, and other articles, playing, singing, or performing for profit, shoeblacking, and any other like occupation carried on in streets or public places (Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 13); and see note (*a*), *infra*.

(*s*) *Ibid.*, s. 2.

(*t*) See note (*p*), *supra*.

(*u*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 3 (1); and see title FACTORIES AND SHOPS, Vol. XIV., pp. 496, 497.

(*a*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 3 (2); and see note (*r*), *supra*.

or workshop (*b*), in any other occupation (*c*); (3) to lift, carry, or move anything so heavy as to be likely to cause him injury (*d*); or (4) in any occupation likely to be injurious to his life, limb, health or education, regard being had to his physical condition (*e*).

Offences and penalties under Employment of Children Act, 1903.

338. If contravention of the foregoing provisions or any bye-laws before mentioned takes place in the case of an employer (*f*), or his agent or workman (*g*), as regards a child under sixteen years of age, the offender may be summarily convicted and punished. Similarly parents or guardians (*h*), conducing to the contravention by wilful default or habitual neglect to exercise due care, are liable to punishment on summary conviction (*i*). Offenders who are under the age of sixteen may be fined on summary conviction, and in case of a second or subsequent offence may, if under the age of fourteen, be sent to an industrial school (*k*), or taken out of the charge or control of the person actually in charge or control, and committed to the charge of some fit person willing to undertake the duty till the child reaches the age of sixteen (*l*).

Time for bringing proceedings.

In the case of summary proceedings for such offences and fines, the information must be laid within three months after the commission of the offence (*m*).

Power of entry.

The officer of the local authority may for the purpose of enforcing the foregoing provisions enter any place of employment under the authority of a justice of the peace, and examine the place and any person therein with respect to a child's employment (*n*).

Saving for industrial schools etc.

339. The foregoing provisions and all bye-laws before mentioned do not apply to the exercise of manual labour by any child under order of detention in a certified industrial or reformatory school, or by any child while receiving instruction in manual labour in any school (*o*).

(*b*) A child under twelve may not be employed in a factory or workshop; see title FACTORIES AND SHOPS, Vol. XIV., pp. 487, 497.

(*c*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 3 (3).

(*d*) *Ibid.*, s. 3 (4); see *ibid.*, s. 3 (6).

(*e*) *Ibid.*, s. 3 (5). A medical certificate sent by the local authority to an employer as to the fitness of a child for a specified employment is admissible as evidence in subsequent proceedings (*ibid.*, s. 3 (6)).

(*f*) *Ibid.*, ss. 5 (1), 6 (3), (4). See *Robinson* v. *Hill* (1910), 26 T. L. R. 17, as to liability of employer for act of servant employing child.

(*g*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 6 (1).

(*h*) The expression "guardian" includes any person who is liable to maintain or has the actual custody of the child (*ibid.*, s. 13).

(*i*) *Ibid.*, s. 5 (2). A parent may be convicted and punished if party to a forged or false certificate or for making a false representation as to the age of the child (*ibid.*, s. 6 (2)).

(*k*) *Ibid.*, s. 5 (3). As to industrial schools, see title EDUCATION, Vol. XII., pp. 70 *et seq.*

(*l*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 5 (4). See Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), repealing Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41).

(*m*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 7. As to procedure in courts of summary jurisdiction, see title MAGISTRATES.

(*n*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 8.

(*o*) *Ibid.*, s. 10.

SECT. 2. In Factories and Workshops.

SECT. 2.—*In Factories and Workshops* (*p*).

The doctrine of common employment.

340. There is no difference between an adult workman and an infant workman so far as regards the doctrine of common employment (*q*).

Restriction of hours of employment.

The periods during which young persons and children (*r*) may be employed in textile (*s*) and non-textile (*t*) factories and workshops, and in print works and bleaching and dyeing works (*a*), are restricted by statute (*b*).

SECT. 3.—*In Public Entertainments.*

Performance by children in streets or licensed premises.

341. An offence punishable on summary conviction (*c*) is committed by any person who (1) causes or procures a boy under fourteen or a girl under sixteen, or who, having the custody, charge, or care of any such child, allows the child to be in any street or in any premises licensed for the sale of intoxicating liquor, other than premises licensed for public entertainments (*d*), for the purpose of singing, playing or performing, or being exhibited for profit, or offering anything for sale between 9 p.m. and 6 a.m. (*e*), or (2) causes or procures a child under eleven, or who, having the custody, charge, or care of any such child, allows the child to be at any time in any street, or in any premises licensed for the sale of intoxicating liquor, or for public entertainments, or in any circus or other place of public amusement to which the public are admitted by payment, for the purpose of singing, playing, or performing, or being exhibited for profit, or offering anything for sale (*f*).

Or in places of public amusement etc.

When restrictions not applicable.

Charitable entertainments.

The restrictions stated above are not applicable in the case of any occasional sale or entertainment, the net proceeds of which are wholly applied for the benefit of any school or charitable object, if (1) the sale or entertainment takes place elsewhere than in premises licensed for the sale of intoxicating liquor but not licensed for

(*p*) The sections of the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), and of the other factory Acts which relate to the employment of children and young persons, are fully dealt with under the title FACTORIES AND SHOPS, Vol. XIV., pp. 433 *et seq.*

(*q*) *Cribb* v. *Kynoch, Ltd.*, [1907] 2 K. B. 548; *Young* v. *Hoffmann Manufacturing Co., Ltd.*, [1907] 2 K. B. 646, C. A. See, further, title MASTER AND SERVANT.

(*r*) See title FACTORIES AND SHOPS, Vol. XIV., p. 445.

(*s*) See *ibid.*, p. 436.

(*t*) See *ibid.*, p. 437.

(*a*) See *ibid.*, p. 438.

(*b*) See *ibid.*, pp. 490 *et seq.* As to provisions relating to employment inside and outside a factory on the same day, see *ibid.*, pp. 494, 495, 509; Sunday employment, meal times, and holidays, *ibid.*, pp. 490 *et seq.*; dangerous and unhealthy industries, *ibid.*, pp. 476 *et seq.*; education of infant employees, title EDUCATION, Vol. XII., pp. 54, 67—70.

(*c*) As to courts of summary jurisdiction generally, see title MAGISTRATES.

(*d*) As to places of public entertainment, see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*e*) Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 2 (b). A local authority (for meaning of expression, see *ibid.*, s. 29, and note (*n*), p. 150, *ante*) may, by bye-law, extend or restrict the hours mentioned in s. 2 (b) (*ibid.*, s. 2 (ii.)).

(*f*) *Ibid.*, s. 2 (c).

SECT. 3. In Public Entertainments.

public entertainments, or (2) if in the case of a sale or entertainment held in such premises a special exemption in writing is granted by two justices of the peace (*g*).

Licence.

342. A petty sessional court (*h*) may, if satisfied of the fitness of the child for the purpose, and that proper provision has been made for its health and kind treatment, grant a licence for a child ten years of age to take part in entertainments in premises licensed for public entertainments, or in any circus or other place of public amusement (*i*).

SECT. 4.—*In Dangerous Performances.*

Dangerous public exhibition or performance.

343. Any person causing a male child under the age of sixteen and a female child under the age of eighteen to take part in any public exhibition or performance, dangerous in the opinion of a court of summary jurisdiction (*k*) to the life or limbs of the child, and the parent or guardian, or person having the custody of the child, who aids and abets the same, may be summarily convicted and fined (*l*).

Restriction on prosecutions.

Except where an accident causing bodily harm occurs, no prosecution may be instituted without the consent in writing of the chief officer (*a*) of the police area in which the offence is committed (*b*).

Proof of age of child.

If the court trying the case considers that the age of the child is that alleged by the informant, the burden of proof that the child is not of that age is on the party charged with the offence (*c*).

Training for acrobatic performances etc.

344. An offence punishable on summary conviction is committed by any person who causes or procures any child under the age of sixteen, or who, having the custody, charge, or care of any such child, allows the child to be in any place for the purpose of being trained as an acrobat, contortionist, or circus performer, or

(*g*) Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 2 (i.). As to arrest of offenders without warrant, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 303, 304, note (*f*).

(*h*) As to which, see title MAGISTRATES.

(*i*) Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 3 (1). Inspectors and officers charged with the execution of the Employment of Children Act, 1903 (3 Edw. 7, c. 45) (see p. 150, *ante*), are also charged with the duty of seeing that the restrictions and conditions of any such licence are properly complied with. For this purpose they are given certain rights of entry into and inspection of places of public entertainment (Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 3 (2)). As to application for licences, see *ibid.*, s. 3 (3), and as to sending licences to local authority see *ibid.*, s. 3 (4). Nothing in ss. 2, 3, *ibid.*, affects the provisions of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79); Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 3 (5). See further, as to the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), title EDUCATION, Vol. XII., pp. 6 *et seq.*

(*k*) As to courts of summary jurisdiction generally, see title MAGISTRATES.

(*l*) Children's Dangerous Performances Act, 1879 (42 & 43 Vict. c. 34), s. 3; Dangerous Performances Act, 1897 (60 & 61 Vict. c. 52), s. 1. As to proceedings on indictment, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 626. See also title THEATRES AND OTHER PLACES OF AMUSEMENT.

(*a*) As to meaning of "chief officer," see Dangerous Performances Act, 1897 (60 & 61 Vict. c. 52), s. 2 (2).

(*b*) *Ibid.*, s. 2 (1).

(*c*) Children's Dangerous Performances Act, 1879 (42 & 43 Vict. c. 34), s. 4.

SECT. 4. In Dangerous Performances.

of being trained for any exhibition or performance which is in its nature dangerous (*d*). A petty sessional court may, if satisfied of the fitness of the child for the purpose, and that proper provision has been made for its health and kind treatment, grant a licence for a child exceeding ten years of age to be trained for the performances stated above (*e*).

SECT. 5.—*In Mines.*

SUB-SECT. 1.—*Coal Mines.*

Underground employment of boys under thirteen or girls is illegal.

345. The employment underground of boys (*f*) under thirteen years of age, and of girls (*f*) and women (*f*) of any age, in any mine of coal, stratified ironstone, shale, or fireclay (*g*) is illegal (*h*).

Employment underground of boys between thirteen and sixteen.

346. Boys between thirteen and sixteen (*i*) years of age may not be employed in any such mine underground for more than fifty-four hours a week, or eight (*k*) hours a day. Between each period of employment not less than twelve hours must elapse, except in the case of employment on Saturday following employment on Friday, when the interval must be not less than eight hours (*l*).

Period of employment.

The period of employment begins at the time of leaving the surface, and ends at the time of returning to the surface.

Length of week.

The period of a week runs from midnight on Saturday night to midnight on the following Saturday night (*m*).

Employment above ground of boys and girls under twelve and under thirteen.

347. The employment of boys and girls under twelve years of age above ground in connection with such a mine (*n*) is illegal (*o*). Boys and girls under thirteen years of age may not be employed above ground for more than six days a week, or, if employed for more than three days in a week, for more than six hours in any

(*d*) Prevention of Cruelty to Children Act, 1904 (4 Edw. 7 c. 15), s. 2 (d).

(*e*) *Ibid.*, s. 3 (1), see s. 2 (iii.); and see note (*i*), p. 153, *ante*. As to courts of petty sessions, see title MAGISTRATES.

(*f*) Under the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 75, a "boy" is a male under sixteen, a "girl" a female under sixteen, and a "woman" a female of sixteen and upwards.

(*g*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 3; and see title MINES, MINERALS, AND QUARRIES.

(*h*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 4; Mines (Prohibition of Child Labour Underground) Act, 1900 (63 & 64 Vict. c. 21), s. 1 (which raised the age of boys within the provision from twelve to thirteen. See Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 9 (which excluded children under twelve employed in mines from the operation of bye-laws under that Act; see p. 150, *ante*).

(*i*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), ss. 5, 75; Mines (Prohibition of Child Labour Underground) Act, 1900 (63 & 64 Vict. c. 21), s. 1.

(*k*) Coal Mines Regulation Act, 1908 (8 Edw. 7 c. 57), s. 1, which applies to workmen generally, and not only to boys. See title MINES, MINERALS, AND QUARRIES.

(*l*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 6 (1).

(*m*) *Ibid.*, s. 6 (2), (3); and generally as to periods of time, see title TIME.

(*n*) See note (*g*), *supra*.

(*o*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 7 (1). See note (*f*), *supra*, for definition of "boy," "girl," "woman."

one day, or, in any other case, for more than ten hours in any one day (*p*).

Boys and girls of or above the age of thirteen and women may not be so employed for more than fifty-four hours a week, nor more than ten hours a day (*q*). Boys and girls over thirteen.

348. Provision is also made in the case of boys, girls, and women employed above ground for cesser of employment in certain hours and days (*r*), for intervals between the termination and commencement of employment (*s*), as to the length of a week (*t*), and for intervals for meals (*u*). The employment of boys, girls, and women in moving railway wagons is illegal (*v*).

349. The owner, agent, or manager of every mine must keep in the office at the mine a register of the name, age, residence, date of first employment of all boys employed below ground, and of all boys, girls, and women employed above ground, in or in connection with the mine. It must be open to the inspection of mine and school inspectors (*a*). Register.

After request by the principal teacher part of the wages earned by boys or girls employed in or in connection with such a mine may be deducted by the employer for the payment of school fees of a public elementary school (*b*). Deduction from wages of children for school fees.

350. The employment of women, young persons, and children in pit banks or places above ground adjacent to the shaft of a mine where the terms of employment do not come under the Coal Mines Regulation Act, 1887 (*c*), or the Metalliferous Mines Regulation Act, 1872 (*d*), is regulated by the Factory and Workshop Act, 1901 (*e*). Employment in pit banks.

(*p*) Coal Mines Regulations Act, 1887, (50 & 51 Vict. c. 58), s. 7 (2).

(*q*) *Ibid.*, s. 7 (3).

(*r*) *Ibid.*, s. 7 (4), namely, between the hours of 9 p.m. and 5 a.m., or on Sunday, or after 2 p.m. on Saturday.

(*s*) *Ibid.*, s. 7 (5), namely, an interval of not less than eight hours between the termination of employment on Friday and the commencement of employment on the following Saturday, and in other cases of not less than twelve hours between the termination of employment on one day and the commencement of the next employment.

(*t*) *Ibid.*, s. 7 (6).

(*u*) *Ibid.*, s. 7 (7). Continuous employment for more than five hours without an interval of half an hour for meals, or for more than eight hours on any one day without an interval or intervals for meals amounting to not less than one and a half hours, is prohibited. Compare title FACTORIES AND SHOPS, Vol. XIV., pp. 446, 490, 491.

(*v*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 7 (8).

(*a*) *Ibid.*, ss. 8, 39.

(*b*) *Ibid.*, s. 10. The request must be made in writing by the principal teacher of the public elementary school attended by the boy or girl to the employer for payment of a weekly sum to be specified in the application, not exceeding twopence per week, and not exceeding one-twelfth part of the wages of the boy or girl. See also Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 7, and title EDUCATION, Vol. XII., p. 64.

(*c*) 50 & 51 Vict. c. 58.

(*d*) 35 & 36 Vict. c. 77.

(*e*) 1 Edw. 7, c. 22, s. 149, Sched. VI., Part II.; Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 83. See, generally, title FACTORIES AND SHOPS, Vol. XIV., pp. 433 *et seq.*

SECT. 5.

In Mines.

SUB-SECT. 2.—*Metalliferous Mines.*

Employment of boys under thirteen, girls, and women.

351. The employment underground of boys under thirteen years of age (*f*), and of girls or women of any age, in mines to which the Metalliferous Mines Regulation Act, 1872 (*g*), applies, is illegal (*h*).

Boys between twelve and sixteen.

352. Boys between twelve and sixteen (*i*) years of age may not be employed underground in any mine to which the Metalliferous Mines Regulation Act, 1872 (*j*), applies for more than fifty-four hours a week, or ten hours a day. Between each period of employment not less than twelve hours must elapse except in the case of employment on Saturday following employment on Friday, when the interval must be not less than eight hours. In the case of boys and young male persons whose employment is at such distance from their ordinary place of residence that they do not return there during the intervals of labour, and who are not employed for more than forty hours a week, the interval must be not less than eight hours (*k*).

Periods of employment.

The period of employment begins at the time of leaving the surface and ends at the time of returning to the surface (*l*).

Length of week.

The period of a week runs from midnight on Saturday night to midnight on the following Saturday night (*l*).

Employment of young persons under eighteen in connection with engines.

353. Machinery used for transporting persons up and down shafts, along inclined planes or levels of any mine to which the Metalliferous Mines Regulation Act, 1872 (*j*), applies, must be in the charge of a male of at least eighteen years of age; and where the machinery is worked by an animal, the driver must be at least twelve years of age (*m*).

Register.

354. The owner or agent of every mine to which the Metalliferous Mines Regulation Act, 1872 (*j*), applies, must keep in the office a register of the name, age, residence, and date of first employment of all boys under sixteen employed in the mine below ground, and of all women, young persons and children employed above ground in connection with the mine; and the register must be open to the inspection of mine inspectors (*n*).

(*f*) Mines (Prohibition of Child Labour Underground) Act, 1900 (63 & 64 Vict. c. 21), s. 1.

(*g*) 35 & 36 Vict. c. 77. The Act applies to all mines other than those to which the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76) (now the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 83) applies (see p. 154, *ante*); Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 3.

(*h*) *Ibid.*, s. 4. See also Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 9 (which excluded children under twelve employed in mines from the operation of bye-laws under that Act).

(*i*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 5; Mines (Prohibition of Child Labour Underground) Act, 1900 (63 & 64 Vict. c. 21), s. 1.

(*j*) 35 & 36 Vict. c. 77.

(*k*) *Ibid.*, s. 5.

(*l*) *Ibid.*

(*m*) *Ibid.*, s. 7. The penalty for employment of persons contrary to the Act is in the case of an owner or agent a fine not exceeding £20, or in the case of any other person £2, for each offence, and a further penalty not exceeding £1 per day if the offence is continued after written notice from an inspector; see *ibid.*, ss. 8, 31. As to prosecution of offences, see *ibid.*, s. 33; and as to definition of court of summary jurisdiction, see *ibid.*, ss. 33, 41, and title MAGISTRATES.

(*n*) *Ibid.*, s. 6.

SECT. 5. In Mines.

The immediate employer, other than the owner or agent of the mine, of every boy under sixteen, must, before employing the boy, report to the owner or agent or some person appointed by them, his intention of so doing (*o*).

Immediate employer's duty.

SECT. 6.—*In Chimney Sweeping.*

355. It is illegal for a chimney sweeper (1) to employ a child under the age of ten years in or to assist in the business of chimney sweeping elsewhere than in the house or place of business, yard or buildings of the chimney sweeper (*p*); or (2) to cause or allow a person under the age of sixteen years in his employment or under his control to be in any part of a house or building which the chimney sweeper has entered for the purpose of cleaning or extinguishing a fire in a chimney (*q*): (3) to cause or allow any child under the age of twenty-one to ascend or descend a chimney or enter a flue for the purpose of sweeping it or extinguishing a fire (*r*). It is illegal to bind a child under the age of sixteen apprentice to a chimney sweeper (*s*). In any prosecution of a chimney sweeper for contravention of the above provisions where the age of any child comes in question, the burden of proof is on the defendant (*t*).

SECT. 7.—*In Shops.*

356. The law relating to the employment of persons under eighteen years of age in or about a shop (*a*) is dealt with elsewhere (*b*).

Employment of persons under eighteen.

SECT. 8.—*Employers' Liability.*

357. Employers of young persons (*c*) are bound to take greater care to protect them from injury than in the case of adults (*d*).

Degree of care.

The doctrine of contributory negligence does not always apply in the case of a young person so as to preclude him from recovering

Contributory negligence.

(*o*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 6.

(*p*) Chimney Sweepers Regulation Act, 1864 (27 & 28 Vict. c. 37), s. 6. Penalty, fine not exceeding £10 (*ibid.*, s. 8).

(*q*) *Ibid.*, s. 7. Penalty, fine not exceeding £10 (*ibid.*, s. 8).

(*r*) Chimney Sweepers and Chimneys Regulation Act, 1840 (3 & 4 Vict. c. 85), s. 2. Penalty, fine from £5 to £10 (*ibid.*), or imprisonment for any term not exceeding six months with or without hard labour (Chimney Sweepers Regulation Act, 1864 (27 & 28 Vict. c. 37), s. 9).

(*s*) Chimney Sweepers and Chimneys Regulation Act, 1840 (3 & 4 Vict. c. 85), s. 3.

(*t*) Chimney Sweepers Regulation Act, 1864 (27 & 28 Vict. c. 37), s. 10.

(*a*) See title FACTORIES AND SHOPS, Vol. XIV., p. 510.

(*b*) See title FACTORIES AND SHOPS, Vol. XIV., pp. 509, 510, 511, 528 *et seq.* As to penalties, see *ibid.*, and pp. 534 *et seq.*; and as to procedure on appeal from conviction by a court of summary jurisdiction, see title MAGISTRATES.

(*c*) Under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 156, a "child" is a person under fourteen and a "young person" is a person who has ceased to be a child and is under eighteen. See also Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 9; and title FACTORIES AND SHOPS, Vol. XIV., pp. 445 *et seq.*

(*d*) *Crocker* v. *Banks* (1888), 4 T. L. R. 324, C. A.; *Grizzle* v. *Frost* (1863), 3 F. & F. 622; *Robinson* v. *Smith* (*W. H.*) *& Son* (1901), 17 T. L. R. 423, C. A.; see, further, title MASTER AND SERVANT.

SECT. 8. **Employers' Liability.**

Compensation.

compensation from an employer through whose default he has been injured (*e*).

During total incapacity of a workman who is under twenty-one years of age at the date of the injury, and whose average earnings are less than 20*s*., an amount equal to the whole of his average weekly earnings may be awarded to him as compensation for the various periods prescribed by the Workmen's Compensation Act, 1906 (*f*), but the weekly payment must in no case exceed 10*s*.

Part X.—Protection of Infants, Children, and Young Persons.

SECT. 1.—*Infant Life Protection.*

SUB-SECT. 1.—*Notice by Person receiving Infants for Reward.*

Notice. Nursing infants for reward.

358. A person undertaking for reward the nursing and maintenance of one or more infants under the age of seven years, apart from their parents or having no parents, must within forty-eight hours from the reception of any such infant give notice in writing to the local authority (*g*). This rule does not apply where the period for which the infant is received is forty-eight hours or less (*h*), but it applies where a person undertakes for reward the nursing and maintenance of an infant already in his care without reward, in which case the entering into the undertaking is treated as the reception of the infant for the purpose of giving notice (*i*).

Notice of death or removal of infant.

Notice in writing must also be given within forty-eight hours of the death of an infant or of its removal from the care of the person who

(*e*) See *Gardner* v. *Grace* (1858), 1 F. & F. 359; *Lynch* v. *Nurdin* (1841), 1 Q. B. 29; *Crocker* v. *Banks* (1888), 4 T. L. R. 324, C. A.; and compare *Mangan* v. *Atterton* (1866), L. R. 1 Exch. 239; *Hughes* v. *Macfie*, *Abbott* v. *Macfie* (1863), 2 H. & C. 744; *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229, 237; see also, further, title NEGLIGENCE.

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1), proviso (b); see, further, title MASTER AND SERVANT.

(*g*) Children Act, 1908 (8 Edw. 7, c. 67), s. 1 (1). The local authority for the purposes of Part I. of this Act is the county council, as respects the county of London, exclusive of the City; the common council, as respects the City of London; and elsewhere, the poor law guardians (*ibid.*, s. 10 (1)). As to expenses incurred by the local authority, see *ibid.*, s. 10 (2); and as to local authorities generally, see title LOCAL GOVERNMENT.

(*h*) Children Act, 1908 (8 Edw. 7, c. 67), s. 1 (1).

(*i*) *Ibid.*, s. 1 (2). The Children Act, 1908 (8 Edw. 7, c. 67), repealed and superseded the Infant Life Protection Act, 1897 (60 & 61 Vict. c. 57), under which similar notice was required (see *ibid.*, s. 2). Where a person undertook the nursing and maintenance of an infant prior to the commencement of the Children Act, 1908 (8 Edw. 7, c. 67), he was bound to give like notice within one month after the commencement of the Act, if he had not given the requisite notice under the Infant Life Protection Act, 1897 (60 & 61 Vict. c. 57). The Children Act, 1908 (8 Edw. 7, c. 67), does not exempt any person who ought to have given notice under the earlier Act from any liability he may have incurred thereunder (Children Act, 1908 (8 Edw. 7, c. 67), s. 1 (6)).

has undertaken the charge, and in the latter case also of the name and address of the person to whose care the infant is transferred (*k*).

Contents of notice.

359. The notice must state the name, sex, and date and place of birth of the infant, the name of the person receiving the infant and the dwelling within which the infant is being kept, and the name and address of the person from whom the infant has been received (*l*).

Notice of change of address.

Notice of change of address of the person undertaking the nursing and maintenance of an infant must be given within forty-eight hours to the local authority. If the new address is in the district of another local authority, the notice to that authority must contain all the particulars required in the original notice (*m*).

Notice, how given.

Notices may be sent by post in a registered letter addressed to the clerk of the local authority, or to such other person as the local authority may appoint, or may be delivered at the office of the local authority (*n*).

Penalties for failure to give notice.

360. Failure to give notice within the time specified is an offence (*a*). If the nursing and maintenance of the infant were undertaken wholly or partly for a lump sum, the defaulter in addition to any other penalty is liable to forfeit such lump sum or a part thereof. The sum forfeited must be applied for the benefit of the infant. The order of the court is enforceable as if it were an order of the court made on complaint (*b*).

False notice.

It is also an offence for any person to make false or misleading statements in a notice (*c*).

SUB-SECT. 2.—*Appointment and Powers of Visitors.*

Appointment of visitors by local authority.

361. It is the duty of every local authority (*d*) from time to time to make inquiry whether there are any persons resident in its district who undertake the nursing and maintenance of infants in respect of whom notice is required to be given (*e*). If there are any such, the local authority must appoint one or more persons of either sex to be infant protection visitors.

Duties of visitors.

The duties of the visitors are from time to time to visit infants referred to in any notice and see that the premises in which they are kept and their nursing and maintenance are satisfactory, and to give advice or directions as to their nursing and maintenance (*f*).

Suitable persons empowered to exercise functions of visitors.

In addition to or instead of appointing infant protection visitors,

(*k*) Children Act, 1908 (8 Edw. 7, c. 67), s. 1 (5).
(*l*) *Ibid.*, s. 1 (3).
(*m*) *Ibid.*, s. 1 (4).
(*n*) *Ibid.*, s. 8 (2).
(*a*) As to penalties, see p. 162, *post*.
(*b*) Children Act, 1908 (8 Edw. 7, c. 67), s. 1 (7). As to enforcement of orders of a court of summary jurisdiction, see title MAGISTRATES.
(*c*) Children Act, 1908 (8 Edw. 7, c. 67), s. 8 (1). As to penalties, see p. 162, *post*.
(*d*) Either alone or in combination with any other local authority (Children Act, 1908 (8 Edw. 7, c. 67), s. 2 (3). For definition of local authority, see note (*g*), p. 158, *ante*.
(*e*) Children Act, 1908 (8 Edw. 7, c. 67), s. 2 (1).
(*f*) *Ibid.*, s. 2 (2).

SECT. 1. **Infant Life Protection.**

a local authority may authorise suitable persons to exercise the powers of visitors. Similarly philanthropic societies, under whose authority infants have been placed out to nurse, may be authorised to exercise similar powers in regard to those infants, subject to the obligation of furnishing periodical reports to the local authority (*g*).

Philanthropic societies.

Exemption from visitation.

Particular premises may be exempted by the local authority from being visited (*h*).

Refusal to admit visitors.

362. The refusal to admit such visitors or other authorised persons is an offence (*i*). So is the obstruction of visitors or other persons who have entered under a magistrate's warrant (*j*).

Entry.

If a visitor or other authorised person is refused admittance to any premises, or has reason to believe that any infants under the age of seven years are being kept in any house or premises in contravention of the Children Act, 1908, Part I. (*k*), a warrant may be granted by a justice authorising the visitor or other person to enter the premises (*l*).

SUB-SECT. 3.—*Restrictions as to Persons who may receive, and as to Number of, Infants.*

Restrictions as to reception of infants.

363. An infant, in respect of whom notice is required to be given (*m*), may not without the written sanction of the local authority be kept (*n*) (1) by any person from whose care any infant has been removed under the Children Act, 1908, Part I. (*o*), or the Infant Life Protection Act, 1897 (*p*), (2) in dangerous or insanitary premises from which any infant has been so removed, or (3) by any person who has been convicted of any offence under the Children Act 1908, Part II. (*q*), or under the Prevention of Cruelty to Children Act, 1904 (*r*).

Number may be fixed.

364. The local authority may fix the number of infants under the age of seven years which may be kept in any dwelling in respect of which a notice has been received (*s*). It is an offence to keep any infant in excess of the fixed number (*t*).

SUB-SECT. 4.—*Removal of Infant.*

Removal by order of magistrate or local authority.

365. An infant in respect of whom notice is required to be given may, on the order of a magistrate (*u*), or of a local authority, and

(*g*) Children Act, 1908 (8 Edw. 7, c. 67), s. 2 (2).
(*h*) *Ibid.*, s. 2 (4).
(*i*) *Ibid.*, s. 2 (5). As to penalties, see p. 162, *post*.
(*j*) Children Act, 1908 (8 Edw. 7, c. 67), s. 2 (6).
(*k*) 8 Edw. 7, c. 67.
(*l*) *Ibid.*, s. 2 (6).
(*m*) *Ibid.*, s. 1.
(*n*) *Ibid.*, s. 3. Infringement of these provisions is an offence under the Act (*ibid.*). As to penalties, see p. 162, *post*.
(*o*) 8 Edw. 7, c. 67; see p. 161, *post*.
(*p*) 60 & 61 Vict. c. 57; repealed by Children Act, 1908 (8 Edw. 7, c. 67).
(*q*) 8 Edw. 7, c. 67.
(*r*) 4 Edw. 7, c. 15.
(*s*) As to such notice, see p. 158, *ante*.
(*t*) Children Act, 1908 (8 Edw. 7, c. 67), s. 4. As to penalties, see p. 162, *post*.
(*u*) As to magistrates generally, see title MAGISTRATES.

until it can be restored to its relatives (*v*) or otherwise lawfully disposed of, be removed to a place of safety (*w*) (1) from overcrowded, dangerous, or insanitary premises, (2) from the custody of a person who by reason of negligence, ignorance, inebriety, immorality, criminal conduct, or other similar cause is unfit to have care of it, or (3) from the custody of any person or from any premises in contravention of any of the provisions of the Children Act, 1908, Part I. (*x*). Application for such an order may be made by a visitor or other person appointed or authorised to execute these provisions (*y*).

Enforcement of order.

Any person refusing to comply with such an order or obstructing its execution is guilty of an offence. An order made by a justice may be enforced by the visitor or any constable. If the order was made by a local authority, the visitor or other person may apply to a justice for an order directing the removal of the infant, and that order is enforceable by the visitor or a constable (*a*).

Variation of trusts for maintenance

366. In the case of removal of a child or young person from the care of any person, where that person is entitled under a trust to maintenance money, the court may direct the trust to be varied and the moneys to be paid to the person to whom the child or young person is committed. An appeal lies from such an order of a court of summary jurisdiction to quarter sessions (*b*).

Removal of infant on conviction of offender.

367. An infant in respect of whom an offence has been committed (*c*) may, on the conviction of the offender, be removed to a place of safety (*d*).

SUB-SECT. 5.—*Notice to Coroner of Death of Infant.*

Notice to coroner.

368. In the case of the death of an infant respecting whom notice is required to be given (*e*), notice must be given to the coroner (*f*). Notice to a coroner may be sent to him by registered post, or delivered at his office or residence (*g*).

(*v*) *I.e.*, grandparents, brothers, sisters, uncles, and aunts, by consanguinity or affinity, and in the case of illegitimate infants the persons who would be so related if the infant were legitimate (Children Act, 1908 (8 Edw. 7, c. 67), s. 11 (2)).

(*w*) The expression "place of safety" means any workhouse or police station, or any hospital, surgery, or any other suitable place, the occupier of which is willing temporarily to receive an infant, child, or young person (*ibid.*, s. 131).

(*x*) *Ibid.*, s. 5 (1).

(*y*) *Ibid.*

(*a*) *Ibid.*, s. 5 (2). As to penalties, see p. 162, *post.*

(*b*) Children Act, 1908 (8 Edw. 7, c. 67), s. 127. As to appeals from orders of a court of summary jurisdiction, see title MAGISTRATES.

(*c*) As to penalties, see p. 162, *post.*

(*d*) Children Act, 1908 (8 Edw. 7, c. 67), s. 9 (1).

(*e*) See p. 158, *ante.*

(*f*) Children Act, 1908 (8 Edw. 7, c. 67), s. 6 (1); and see title CORONERS, Vol. VIII., p. 242. This notice is in addition to notice under the Children Act, 1908 (8 Edw. 7, c. 67), s. 1 (5). Failure to give the requisite notice within the specified period or making false statements in a notice are offences (*ibid.*, ss. 6 (2), 8 (1)). As to offences, see p. 162, *post.*

(*g*) Children Act, 1908 (8 Edw. 7, c. 67), s. 8 (2).

SECT. 1. **Infant Life Protection.**

SUB-SECT. 6.—*Policies of Insurance on Life of Infant.*

Insurable interest.

369. A person who keeps an infant in respect of whom notice is required to be given (*h*) has no insurable interest in its life (*i*). The insurance of such a life in favour of the person keeping the child is an offence (*j*) on the part of the person and of the insurance office.

SUB-SECT. 7.—*Punishment.*

Punishment.

370. Offences under the foregoing provisions (*k*) are punishable on summary conviction by imprisonment for a term not exceeding six months, or a fine not exceeding £25 (*l*).

Application of fines.

The fines are payable to the local authority and applicable to the purposes to which the fund or rate out of which the expenses of the local authority are to be defrayed is applicable (*m*).

SUB-SECT. 8.—*Exemptions.*

Persons exempted from Children Act, 1908, Part I.

371. The provisions before enumerated (*n*) do not extend (1) to any relative or legal guardian undertaking the nursing and maintenance of an infant; (2) to any person undertaking the nursing or maintenance of an infant under the provisions of any Act for the relief of the poor or of any order made under any such Act; (3) to hospitals, convalescent homes or institutions established for the protection and care of infants, and conducted in good faith for religious or charitable purposes (*o*); or (4) to boarding schools at which efficient elementary education is provided (*p*).

SECT. 2.—*Cruelty to and Exposure to Danger of Children and Young Persons.*

SUB-SECT. 1.—*In General.*

Suffocation.

372. The Children Act, 1908 (*q*), provides for the prevention of cruelty to children and young persons.

In certain circumstances the suffocation of a child by overlaying is deemed to be neglect (*r*).

(*h*) See p. 158, *ante*.

(*i*) Children Act, 1908 (8 Edw. 7, c. 67), s. 7; see Life Assurance Act, 1774 (14 Geo. 3, c. 48), and title INSURANCE.

(*j*) Children Act, 1908 (8 Edw. 7, c. 67), s. 7. As to limitation of amount payable on an insurance policy taken out with a friendly society and other provisions relating to the insurance of infants, see title FRIENDLY SOCIETIES, Vol. XV., pp. 156 *et seq.* As to penalties, see *infra*.

(*k*) See pp. 158 *et seq.*, *ante*, and *supra*.

(*l*) Children Act, 1908 (8 Edw. c. 67), s. 9 (1).

(*m*) *Ibid.*, s. 9 (2); see *ibid.*, s. 10 (2).

(*n*) See pp. 158 *et seq.*, *ante*, and *supra*, which state the effect of Part I. of the Children Act, 1908 (8 Edw. 7, c. 67).

(*o*) As to the meaning of "religious or charitable purposes," see title CHARITIES, Vol. IV., pp. 108 *et seq.*

(*p*) Children Act, 1908 (8 Edw. 7, c. 67), s. 11 (1).

(*q*) 8 Edw. 7, c. 67, s. 12 (1), (2), (3); see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 584, 623—625. As to the meaning of exposing a child in a manner likely to cause it harm, see *R.* v. *Williams* (1910), 26 T. L. R. 290. The offence need not be by physically placing the child somewhere with intent to injure (*ibid.*).

(*r*) Children Act, 1908 (8 Edw. 7, c. 67), s. 13; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 626.

SUB-SECT. 2.—*Protection from Fire.*

SECT. 2. Cruelty to and Exposure to Danger of Children etc.

373. Any person over the age of sixteen years who has the custody, charge, or care of any child under the age of seven years, and who allows the child to be in any room containing an open fire grate not sufficiently protected to guard against the risk of the child being burnt or scalded, without taking reasonable precautions against that risk, is liable on summary conviction to a fine not exceeding £10 if the child is killed or suffers serious injury. But this provision does not affect the liability of any such person to be proceeded against by indictment for any indictable offence (*s*).

Protection from fire.

SUB-SECT. 3.—*Begging.*

374. Any person who causes or procures (*t*) any child or young person (*a*), or who, having the custody, charge, or care of a child or young person, allows him to be in any street (*b*), premises or place for the purpose of begging or receiving alms, or of inducing the giving of alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise, is liable on summary conviction to a fine not exceeding £25, or alternatively or additionally to imprisonment with or without hard labour for any term not exceeding three months (*c*). Where any person having the custody (*d*), charge, or care of a child or young person is charged with any of the above offences, the burden of proof that the child or young person was begging without his permission is on the person charged (*e*).

Begging.

SUB-SECT. 4.—*Prostitution.*

375. Any person having the custody, charge, or care of a child or young person between the ages of four and sixteen, and allowing it to reside in or frequent a brothel (*f*), is guilty of a misdemeanour. The penalty on conviction on indictment or on summary conviction is a fine not exceeding £25, or alternatively or additionally to imprisonment with or without hard labour for any term not exceeding six months (*g*).

Permitting child to reside in brothel.

(*s*) Children Act, 1908 (8 Edw. 7, c. 67), s. 15. As to courts of summary jurisdiction, see title MAGISTRATES.

(*t*) As to the meaning of "procure," see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 253.

(*a*) For definition, see p. 44, *ante*.

(*b*) *I.e.*, including any highway and any public bridge, road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not (Children Act, 1908 (8 Edw. 7, c. 67), s. 131).

(*c*) *Ibid.*, s. 14 (1).

(*d*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 624, note (*i*).

(*e*) Children Act, 1908 (8 Edw. 7, c. 67), s. 14 (2).

(*f*) As to meaning of "brothel," see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 542.

(*g*) Children Act, 1908 (8 Edw. 7, c. 67), s. 16 (1), which does not affect the liability of a person to be indicted under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 6 (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 617). Upon the trial of a person under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), the jury may convict the accused of an offence under the Children Act, 1908 (8 Edw. 7, c. 67), s. 16 (*ibid.*, s. 16 (2)).

SECT. 2. Cruelty to and Exposure to Danger of Children etc.

Encouraging seduction or prostitution.

376. Any person having the custody, charge, or care of a girl under sixteen years of age is guilty of a misdemeanour if he causes or encourages the seduction (*h*) or prostitution of the girl by knowingly allowing her to consort with or to enter or continue in the employment of any prostitute or person of known immoral character or otherwise. The penalty is imprisonment with or without hard labour for any term not exceeding two years (*i*). Where a court of summary jurisdiction is satisfied that a girl under the age of sixteen is with the knowledge of her parent or guardian exposed to the risk of seduction or prostitution, or living a life of prostitution, the court may bind over the parent or guardian to exercise proper care (*j*). Such recognizances fall within the scope of the Summary Jurisdiction Act, 1879 (*k*).

SECT. 3.—*Provisions for Safety.*

SUB-SECT. 1.—*Detention in Place of Safety.*

Removal of child or young person to place of safety.

377. A constable, or any person authorised by a justice, may take to a place of safety (*l*) any child or young person in respect of whom an offence under the Children Act, 1908 (*m*), Part II., or any of the offences mentioned in Schedule I. to that Act (*n*), has been, or there is reason to believe has been, committed (*o*).

Detention of child.

Jurisdiction of justices.

Such child or young person, and also any child or young person who seeks refuge in a place of safety, may be detained there until he can be brought before a court of summary jurisdiction (*p*). The court has then the choice of two alternatives. It may (1) cause the child or young person to be dealt with as circumstances may admit and require, until the alleged offender is convicted or acquitted, or, where the court thinks an offence has been committed, (2) may, without prejudice to any other power under the Children Act, 1908 (*q*), make an order for the care and detention of the child or young person until a reasonable time has elapsed for a charge to be made against some person for having committed the offence,

(*h*) *I.e.*, inducing a girl to surrender her chastity for the first time (*R.* v. *Moon* (*Frederick*), *R.* v. *Moon* (*Emily*), [1910] 1 K. B. 818, C. C. A.).

(*i*) Children Act, 1908 (8 Edw. 7, c. 67), s. 17. As to offences under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 614 *et seq.*

(*j*) Children Act, 1908 (8 Edw. 7, c. 67), s. 18 (1).

(*k*) *Ibid.*, s. 18 (2); and see title MAGISTRATES.

(*l*) As to the meaning of the expression "place of safety," see note (*w*), p. 161, *ante*. As to the reception and maintenance of children and young persons in workhouses, see Children Act, 1908 (8 Edw. 7, c. 67), s. 126.

(*m*) 8 Edw. 7, c. 67. For such offences, see pp. 158—162, *ante*.

(*n*) *I.e.*, any offence under the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 27, 55, or 56, or against a child or young person under ss. 5, 42, 43, 52, or 62 (*ibid.*), or under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69) (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 408, 614), or under the Dangerous Performances Acts, 1879 and 1897 (42 & 43 Vict. c. 34; 60 & 61 Vict. c. 52), and any other offence involving bodily injury to a child or young person.

(*o*) Children Act, 1908 (8 Edw. 7, c. 67), s. 20 (1).

(*p*) As to such courts, see title MAGISTRATES.

(*q*) 8 Edw. 7, c. 67.

SECT. 3. Provisions for Safety.

and if a charge is made within that time, until it has been determined by the conviction or discharge of the accused, and, in case of conviction, for such further time (not exceeding twenty-one days) as the court which convicted may direct. Any such order may be carried out notwithstanding that some person is claiming the custody of the child or young person (*r*).

SUB-SECT. 2.—*Order Disposing of Child or Young Person in the Custody of Undesirable Person.*

Order where person in charge of child is convicted, committed for trial, or bound over.

378. In the event of the conviction, or committal for trial in respect of certain offences (*s*), or the binding over by any court of a person having the custody or care of a child or young person, the court may order the child or young person to be transferred to the care of a relative or some other fit person (*a*) named by the court, and being willing to undertake the charge (*b*), until the child or young person attains the age of sixteen years, or for any shorter period (*c*).

Order to be in writing.

The order must be in writing, and may be made in the absence of the child or young person (*d*). The court, or any court of like jurisdiction, may of its own motion or on the application of any person from time to time by order renew, vary, and revoke any such order (*e*).

Power to renew, vary, or revoke order.

Order made void.

An order made in respect of a person committed for trial is rendered void by the acquittal of such person, or the dismissal of the charge, except with regard to anything that may have been lawfully done under it (*f*).

Children or young persons found begging, or wandering or destitute, or living in criminal or immoral surroundings may on being brought before the court by any person be committed to the care of a relative or other fit person (*g*).

Jurisdiction of Secretary of State.

379. The Secretary of State (*h*) may at any time, either absolutely or on conditions, discharge a child or young person from the care of any person to whose care he is committed. He may also make rules in relation to children and young persons so committed,

(*r*) Children Act, 1908 (8 Edw. 7, c. 67), s. 20 (2), (3).

(*s*) For such offences, see pp. 158—162, and note (*n*), p. 164, *ante*.

(*a*) Including any society or body corporate established for the reception or protection of poor children, or the prevention of cruelty to children (Children Act, 1908 (8 Edw. 7. c. 67), s. 38).

(*b*) The consent of the person willing to undertake the care may be proved in such manner as the court thinks fit (*ibid.*, s. 21 (3)).

(*c*) *Ibid.*, s. 21 (1). The court may, instead, send the child to an industrial school (*ibid.*, s. 21 (7)). As to other cases in which children or young persons may be sent to industrial schools, see *ibid.*, s. 58 (2), (3), and titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 421, 422; EDUCATION, Vol. XII., pp. 56, 71, 72.

(*d*) Children Act, 1908 (8 Edw. 7, c. 67), s. 21 (3).

(*e*) *Ibid.*, s. 21 (1). As to costs on revocation, see *Re O'Halloran* (1906), 70 J. P. 8.

(*f*) Children Act, 1908 (8 Edw. 7, c. 67), s. 21 (4).

(*g*) *Ibid.*, ss. 58 (1), 59. The court may in addition make an order under the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), respecting the child or young person (Children Act, 1908 (8 Edw. 7, c. 67), s. 60). As to the duty of the police authority to take proceedings under *ibid.*, s. 58 (1), see *ibid.*, s. 58 (8), and title EDUCATION, Vol. XII., p. 56.

(*h*) For the Home Department; see title CONSTITUTIONAL LAW, Vol. VII., p. 82.

SECT. 3. Provisions for Safety.

and to the duties of the committee (*i*). He may also empower the committee to procure the emigration of the child or young person. In this regard the committee may not act on his own responsibility (*k*).

Emigration.

SUB-SECT. 3.—*Maintenance after Order disposing of Child or Young Person.*

Position of committee.

380. A person to whose care a child or young person is committed (*l*) has, while the order remains in force, the like control as if he were the parent. He is responsible for the maintenance of the child or young person, and the child or young person must continue in his care, notwithstanding a claim by the actual parent (*m*) or any other person (*n*).

Order exacting contribution from parent.

381. The court (*o*) may order the parent of, or other person (*p*) liable to maintain the child or young person committed, to contribute to his maintenance until he attains the age of sixteen. Such an order is enforceable in the same manner as an affiliation order (*q*), but the amount of the weekly sum to be contributed may not exceed £1 (*r*). The order may be made on the application of the committee at the time of committal or subsequently (*s*).

Order cannot be made prior to trial of offender.

Where the order to commit a child or young person is made by reason of a person having been committed for trial for an offence, an order for contribution towards maintenance cannot be made prior to the trial of the accused (*t*). In a proper case part of a pension payable to the parent or other person liable for maintenance may be attached by the court (*u*).

The court to make the order.

An order may be made for the above-mentioned purposes by any court before which a person is charged with an offence under the Children Act, 1908 (*v*), Part II., without regard to the place in which the person to whom the payment is ordered to be made may reside (*w*).

(*i*) Children Act, 1908 (8 Edw. 7, c. 67), s. 21 (5).
(*k*) *Ibid.*, s. 21 (6).
(*l*) *I.e.*, any court having power to commit a child or young person (see *ibid.*, s. 22 (2)).
(*m*) Apart from this provision, a parent is entitled to recover the custody of a child which has been transferred to another by agreement. See *Swift* v. *Swift* (1865), 34 Beav. 266; and p. 106, *ante*.
(*n*) Children Act, 1908 (8 Edw. 7, c. 67), s. 22 (1). To assist or induce a child or young person to escape from, or to prevent him from returning to, his committee is an offence punishable by fine not exceeding £20, or imprisonment with or without hard labour for not exceeding two months (*ibid.*).
(*o*) See note (*l*), *supra*.
(*p*) Including a step-parent, a person cohabiting with the mother, whether or not such person is the putative father, and in the case of illegitimacy the putative father (Children Act, 1908 (8 Edw. 7, c. 67), s. 125). Where in case of illegitimacy an affiliation order for the maintenance of the child has been made on the application of the mother, the court may order payments due thereunder to be applied for maintenance.
(*q*) Children Act, 1908 (8 Edw. 7, c. 67), ss. 22 (2), 75 (3). See title BASTARDY Vol. II., p. 452.
(*r*) Children Act, 1908 (8 Edw. 7, c. 67), s. 22 (2).
(*s*) *Ibid.*, s. 22 (3).
(*t*) *Ibid.*, s. 22 (4).
(*u*) *Ibid.*, s. 22 (5).
(*v*) 8 Edw. 7, c. 67
(*w*) *Ibid.*, s. 22 (6).

SUB-SECT. 4.—*Religious Education.*

SECT. 3. Provisions for Safety.

382. In determining upon a committee the court (*a*) endeavours to select one of the same religious persuasion as that of the child or young person committed to his care, or at least one who gives a sufficient undertaking to bring up the child or young person in accordance with its own religious persuasion. Such religious persuasion must be specified in the order (*b*). Selection of committee.

Where a child or young person has been placed by order of the court with a person of a different religious persuasion, or with one who has not given the above undertaking, or who has not observed such undertaking, and a fit person is forthcoming of the same religious persuasion or prepared to give the above undertaking, and willing to receive the child or young person, the court may make an order for the transfer of the child or young person (*c*). Transfer of child to new committee. Non-observance of undertaking.

SUB-SECT. 5.—*Visitation of Institutions and Homes.*

383. The Secretary of State (*d*) may cause any institution for the reception of poor children or young persons, supported wholly or partly by voluntary contributions and not previously liable to be inspected by or under the authority of any Government department, to be visited and inspected from time to time by persons appointed by him for the purpose (*e*). Inspection of institutions.

He may also, with the consent of any society or body corporate established for the reception or protection of poor children, or the prevention of cruelty to children, appoint officers of the society or body corporate to be visitors or inspectors, and prescribe conditions regulating their duties (*f*). Such appointments are revocable at any time by the Secretary of State (*g*).

Inspectors of institutions belonging to any particular denomination are, if practicable and if so desired by the managers, to be of the same denomination (*h*). Similarly, inspectors of institutions for the reception of girls only are to be women (*i*). Religious persuasion of inspectors. Female inspectors.

Persons so appointed are empowered to enter such institutions, and anyone obstructing them in the execution of their duties is liable on summary conviction to a fine not exceeding £5. A refusal to allow an inspector to enter is, for the purposes of the provisions of the Children Act, 1908 (*k*), relating to search warrants, deemed to be a reasonable cause to suspect the committal of an offence (*l*). Powers of inspectors.

(*a*) See note (*l*), p. 166, *ante*.
(*b*) Children Act, 1908 (8 Edw. 7, c. 67), s. 23 (1); and compare the practice in the Chancery Division in respect of religious education, pp. 112, 113, *ante*.
(*c*) Children Act, 1908 (8 Edw. 7, c. 67), s. 23 (2), (3).
(*d*) See note (*h*), p. 165, *ante*. As to inspection of reformatory and industrial schools, see title EDUCATION, Vol. XII., p. 72.
(*e*) Children Act, 1908 (8 Edw. 7, c. 67), s. 25 (1).
(*f*) *Ibid.*
(*g*) *Ibid.*, s. 25 (5).
(*h*) *Ibid.*, s. 25 (3).
(*i*) *Ibid.*, s. 25 (4).
(*k*) 8 Edw. 7, c. 67, s. 24. See p. 168, *post*.
(*l*) Children Act, 1908 (8 Edw. 7, c. 68). s. 25 (2).

SECT. 4. Prosecution of Offenders.

SECT. 4.—*Prosecution of Offenders.*

SUB-SECT. 1.—*Arrest without Warrant.*

When constable may arrest without warrant.

384. Any constable may arrest without warrant a person who within view of the constable commits an offence under the Children Act, 1908, Part II. (*m*), or any of the offences mentioned in Schedule I. thereto (*n*), where the name and residence of the offender are unknown to and unascertainable by the constable. Similarly, he may arrest a person who has committed, or who he has reason to believe has committed, an offence of cruelty or any of the offences mentioned in the same Schedule (*n*), if he has reasonable ground for believing that the offender will abscond, or if the name and address of the offender are unknown to and unascertainable by him (*o*).

Release of accused on bail.

Where a constable in pursuance of this power arrests any person without warrant, the officer in charge of the police station to which the accused is brought should release him on bail, unless the officer believes that his release would tend to defeat the ends of justice, or to cause injury to the child or young person against whom the offence is alleged to have been committed (*p*).

SUB-SECT. 2.—*Search Warrant.*

Search warrant.

385. A justice may issue a search warrant (*q*), or warrant for removal, in the following circumstances. Information on oath must be laid by a person who in the opinion of the justice is acting in the interests of a child or young person that there is reasonable cause to suspect (1) that the child or young person has been or is being assaulted, illtreated, or neglected, in any place within the jurisdiction of the justice, in a manner likely to cause the child or young person unnecessary suffering, or to be injurious to his health, or (2) that an offence under the Children Act, 1908 (*r*), Part II., or any offence mentioned in Schedule I. thereto, has been or is being committed in respect of the child or young person (*s*).

Purport.

The search warrant may authorise a constable named therein to search for the child or young person concerned, and, if the suspicion mentioned above is well founded, to take him to and detain him in a place of safety until he can be brought before a court of summary jurisdiction (*t*), or a warrant may be issued authorising any constable to remove the child or young person, with or without search, to a

(*m*) See pp. 162—164, *ante*.

(*n*) See note (*n*), p. 164, *ante*.

(*o*) Children Act, 1908 (8 Edw. 7, c. 67), s. 19 (1) (a), (b). See, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 303, 304, note (*f*), 608 *et seq.*

(*p*) Children Act, 1908 (8 Edw. 7, c. 67), s. 19 (2).

(*q*) As to search warrants generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310.

(*r*) 8 Edw. 7, c. 67.

(*s*) *I bid.*, s. 24 (1). There is no need to specify the name of the child or young person in the information or warrant (*ibid.*, s. 24 (5)). As to these offences, see p. 164, *ante*.

(*t*) As to courts of summary jurisdiction, see title MAGISTRATES.

place of safety and detain him there until he can be brought before a court of summary jurisdiction (*u*).

Jurisdiction of court.

386. The court before whom the child or young person is brought may commit him to the care of a relative or other fit person in like manner as if the person whose care he was in had been committed for trial for an offence under the Children Act, 1908, Part II. (*v*).

A justice issuing a warrant may by it cause the accused to be apprehended and brought before a court of summary jurisdiction and legal proceedings to be taken against him (*a*).

Execution of warrant.

The warrant must be addressed to and executed by a constable. He must be accompanied by the person laying the information, if the latter so desires, unless otherwise ordered by the justice. The justice may also direct him to be accompanied by a duly qualified medical practitioner (*b*).

Entry by constable.

The constable so authorised may enter, if need be by force, any house, building, or other place specified in the warrant, and remove the child (*c*).

SUB-SECT. 3.—*Habitual Drunkards.*

Detention in retreat.

387. Where any person who is convicted of an offence of cruelty (*d*), or of any of the offences mentioned in the Children Act, 1908, Schedule I. (*e*), against a child or young person is a parent of, or is living with the parent of, such child or young person, and is an habitual drunkard (*f*), the court may, instead of sentencing him to imprisonment, order him to be detained in a retreat (*g*) for any period named in the order not exceeding two years (*h*). But an order for detention in a retreat can only be made with the consent of, and having regard to, any objections of the husband or wife of the person charged; and the court must be satisfied that reasonable provision will be made for defraying the expenses of such person during detention (*i*).

Penalty for being drunk while in charge of child.

388. A person found drunk in any highway or public place (*k*), whether a building or not, or on any licensed premises, while

(*u*) Children Act, 1908 (8 Edw. 7, c. 67), s. 24 (1).
(*v*) *Ibid.* As to these offences, see p. 164, *ante*.
(*a*) Children Act, 1908 (8 Edw. 7, c. 67), s. 24 (2).
(*b*) *Ibid.*, s. 24 (4). As to duly qualified medical practitioners, see title MEDICINE AND PHARMACY.
(*c*) Children Act, 1908 (8 Edw. 7, c. 67), s. 24 (3).
(*d*) *Ibid.*, s. 12 (8).
(*e*) 8 Edw. 7, c. 67. See note (*n*), p. 164, *ante*.
(*f*) As to the meaning of "habitual drunkard," see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 417. See also title INTOXICATING LIQUORS.
(*g*) "A retreat" is "a house licensed by the licensing authority named by this Act for the reception, control, care and curative treatment of habitual drunkards" (Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19)).
(*h*) Children Act, 1908 (8 Edw. 7, c. 67), s. 26.
(*i*) *Ibid.*, s. 26 (a), (b), (c). These provisions do not affect the power of the court to order a person convicted to be detained in a certified inebriate reformatory (*ibid.*, s. 26 (d)). See Inebriates Act, 1898 (61 & 62 Vict. c. 60), and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 417.
(*k*) For definition, see Licensing Act, 1902 (2 Edw. 7, c. 28), s. 8. See also title INTOXICATING LIQUORS.

SECT. 4. Prosecution of Offenders.

having the charge of a child, apparently under the age of seven years, may be arrested. If the child is under seven (*l*), the person found drunk is liable on summary conviction to a fine or imprisonment (*m*).

SECT. 5.—*Procedure.*

SUB-SECT. 1.—*Evidence.*

Evidence of accused person.

389. Where proceedings are taken against a person for an offence under the Children Act, 1908, Part II. or Schedule I. (*n*), the Criminal Evidence Act, 1898 (*o*), is applicable (*p*).

Deposition of child or young person.

390. Where the attendance in court of a child or young person would involve serious danger to his life or health, his evidence may be taken by deposition in writing (*q*).

Evidence of child of tender years.

391. In certain cases the unsworn evidence of a child of tender years is receivable in evidence (*r*).

Admission of public.

392. The court also has power in certain cases to clear the court whilst children or young persons are giving evidence (*s*).

SUB-SECT. 2.—*Miscellaneous.*

Power to proceed in absence of child or young person.

393. In any proceedings for offences under the Children Act, 1908 (*n*), the case may be proceeded with and determined in the absence of the child or young person in respect of whom the offence is alleged to have been committed, where the court is satisfied that the attendance of such child or young person for the purpose of giving evidence (*t*) is not essential (*u*).

Mode of charging offences.

394. The same information or summons may charge a person (1) with committing an offence (*v*) against one or two or more children or young persons, but separate penalties may not be

(*l*) As to the burden of proof of age, see Licensing Act, 1902 (2 Edw. 7, c. 28), s. 2 (2).

(*m*) *Ibid.*, s. 2 (1). The offence under this provision is to be included in the list of offences mentioned in the Inebriates Act, 1898 (61 & 62 Vict. c. 60), Sched. I., and in the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 60, now repealed; but see Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 40 (1); Licensing Act, 1902 (2 Edw. 7, c. 28), s. 2 (3); see *R.* v. *Briggs*, [1909] 1 K. B. 381, C. C. A., and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 554.

(*n*) 8 Edw. 7, c. 67.

(*o*) 61 & 62 Vict. c. 36.

(*p*) Children Act, 1908 (8 Edw. 7, c. 67), s. 27. See, further, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 377—408; EVIDENCE, Vol. XIII., p. 569.

(*q*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 328, 367.

(*r*) Children Act, 1908 (8 Edw. 7, c. 67), s. 30; *R.* v. *Paul* (1890), 25 Q. B. D. 202, C. C. R. See, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 315, note (*n*), 408. As to when a child can be sworn, see *R.* v. *Dent* (1907), 71 J. P. 511; *R.* v. *Beer* (1898), 62 J. P. 120, and title EVIDENCE, Vol. XIII., p. 569.

(*s*) Children Act, 1908 (8 Edw. 7, c. 67), s. 114. See, further, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 362, 363; MAGISTRATES.

(*t*) *R.* v. *Hale*, [1905] 1 K. B. 126, 129, C. C. R.

(*u*) Children Act, 1908 (8 Edw. 7, c. 67), s. 31.

(*v*) *I.e.*, an offence under *ibid.*, Part II., or one of the offences mentioned in *ibid.*, Sched. I.; see note (*n*), p. 164, *ante*.

imposed for each child or young person except upon separate informations (*a*); (2) as having the custody, charge, or care alternatively or together; (3) with the offences of assault, ill-treatment, neglect, abandonment or exposure, together or separately; and (4) with committing all or any of these offences in a manner likely to cause unnecessary suffering or injury to health, alternatively or together, but in such case a separate penalty may not be imposed for each offence (*b*).

Limitation of time.

395. Unless the offence was wholly or partly committed within six months before the information was laid, the party charged may not be summarily convicted. But evidence may be taken of acts constituting or contributing to constitute the offence, and committed at any previous time (*c*).

Continuous offences.

396. In the case of a continuous offence it is not necessary to specify in the information, summons, or indictment the date of the acts constituting the offence (*d*).

Appeals.

397. An appeal lies to quarter sessions (1) from a conviction by a court of summary jurisdiction under the Children Act, 1908, Part II. (*e*), and (2) from an order of such court committing a child or young person to the care of any person, or decreeing contribution to the maintenance of a child or young person (*e*).

Proceedings by guardians; by local authority.

398. Proceedings for offences in relation to children or young persons may be instituted by a board of guardians, and the costs and expenses paid out of their common fund (*f*). The like power of instituting proceedings may in London be exercised by a local authority for the purposes of the Children Act, 1908, Part I. (*g*).

Application of Vexatious Indictments Act, 1859.

A misdemeanour under the Children Act, 1908 (*h*), Part II., falls within the scope of the Vexatious Indictments Act, 1859 (*i*), and any amending Act (*j*).

Extension of Poor Law Act, 1879.

399. By the Children Act, 1908 (*k*), the Poor Law Act, 1879 (*l*), s. 10, is amended so as to include in it, as one of the associations or societies to which a board of guardians may, with the consent of the Local Government Board, subscribe, any society or body corporate for the prevention of cruelty to children.

(*a*) Children Act, 1908 (8 Edw. 7, c. 67), s. 32 (1).
(*b*) *Ibid.*, s. 32 (2).
(*c*) *Ibid.*, s. 32 (3). Compare *R.* v. *Chandra Dharma*, [1905] 2 K. B. 335, C. C. R. (a case under the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 27).
(*d*) Children Act, 1908 (8 Edw. 7, c. 67), s. 32 (4). See *R.* v. *Miller* (1901), 65 J. P. 313.
(*e*) 8 Edw. 7, c. 67, s. 33; and see *R.* v. *Dickinson, Ex parte Davis*, [1910] 1 K. B. 469. As to general procedure on such appeals, see title MAGISTRATES.
(*f*) Children Act, 1908 (8 Edw. 7, c. 67), s. 34 (1).
(*g*) *Ibid.*, s. 34 (2).
(*h*) 8 Edw. 7, c. 67.
(*i*) 22 & 23 Vict. c. 17.
(*j*) 8 Edw. 7, c. 67, s. 35. For offences to which the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), applies, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 331.
(*k*) 8 Edw. 7, c. 67, s. 36.
(*l*) 42 & 43 Vict. c. 54. See, further, title POOR LAW.

SECT. 6. Other Offences in respect of Children etc.

SECT. 6.—*Other Offences in respect of Children and Young Persons (m).*

SUB-SECT. 1.—*Betting, Loans, and Pawns.*

Inviting minors to bet or borrow.

400. A person is guilty of a misdemeanour if for profit or reward he sends any document to an infant for the purpose of inciting him to bet or to borrow money (*n*).

Pawns.

401. It is illegal for a pawnbroker to take an article in pawn from any person apparently under the age of fourteen, whether offered by that person on his own behalf or on behalf of any other person (*o*).

SUB-SECT. 2.—*Sale of Intoxicating Liquor.*

Penalty for giving intoxicating liquor to children.

402. A person giving to any child under the age of five any intoxicating liquor (*p*), except upon the order of a duly qualified practitioner, or in case of sickness or apprehended sickness, or other urgent cause, is liable on summary conviction to a fine not exceeding £3 (*q*).

Child on licensed premises.

403. A licence-holder may not allow a child under fourteen years of age to be in the bar of licensed premises, except during the hours of closing (*r*).

SUB-SECT. 3.—*Sale of Old Metal.*

Purchase from person under sixteen.

404. A dealer in old metal (*s*), or a marine store dealer (*t*), who purchases from any person apparently under the age of sixteen any

(*m*) For offences against children under the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), and under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 611 *et seq.*

(*n*) Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), ss. 1, 2. See also Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 5; *Milton* v. *Studd*, [1910] 2 K. B. 118; *R.* v. *Witkowski* (1911), 75 J. P. 171; and p. 65, *ante;* titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 552; MONEY AND MONEY-LENDING.

(*o*) Children Act, 1908 (8 Edw. 7, c. 67), s. 117. The offence is punishable under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 32 (1), which imposes a penalty on pawnbrokers receiving pledges from persons under the age of twelve. The Children Act, 1908 (8 Edw. 7, c. 67), s. 117, merely raises the age of the child. Nothing in these provisions affects the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 50, which imposes a penalty upon pawnbrokers within the metropolitan police district receiving pledges from persons under the age of sixteen. See Children Act, 1908 (8 Edw. 7, c. 67), s. 117; and title PAWNS AND PLEDGES.

(*p*) See Children Act, 1908 (8 Edw. 7, c. 67), s. 131; see also Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 110, and title INTOXICATING LIQUORS.

(*q*) Children Act, 1908 (8 Edw. 7, c. 67), s. 119.

(*r*) *Ibid.*, s. 120; and see *Russon* v. *Dutton* (1911), 75 J. P. 207. See also title INTOXICATING LIQUORS.

(*s*) Defined by the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 13, as a "person dealing in, buying, and selling old metal, scrap-metal, broken metal, or partly manufactured metal goods or defaced or old metal goods, and whether such person deals in such articles only or together with secondhand goods or marine stores." "Old metal," for the purposes of the Children Act, 1908 (8 Edw. 7, c. 67), s. 116, includes "scrap-metal, broken metal, or partly manufactured metal goods and old or defaced metal." See also title TRADE AND TRADE UNIONS.

(*t*) See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 538 (1); and see titles SHIPPING AND NAVIGATION; TRADE AND TRADE UNIONS.

old metal, whether offered for sale by that person on his own behalf or on behalf of any other person, is liable on summary conviction to a fine not exceeding £5 (*a*).

SUB-SECT. 4.—*Safety at Entertainments.*

405. Where more than one hundred children attend an entertainment, held elsewhere than in a private house (*b*), and access to any part of the building is by stairs, the provider of the entertainment must see that a sufficient number of adult attendants are stationed, wherever necessary, to prevent the admission of more children or other persons than can properly be accommodated, and to control their movement whilst entering and leaving, and to take all other reasonable precautions for the safety of the children (*c*). The occupier of a building, who permits it to be used for hire or reward for the purpose of an entertainment, must take reasonable steps to secure the observance of the above provisions (*d*). A constable may enter any building in which he has reason to believe that such an entertainment is being provided, for the purpose of seeing that the above provisions are carried into effect (*e*). Duty of provider of entertainment.

Persons failing to fulfil the above obligations are liable to be fined on summary conviction; and, if the building is licensed for music or dancing, the licence may be revoked (*f*). Penalties on failure to fulfil obligations.

Legal proceedings should be instituted (1) by the county or borough council where the building is one licensed by the Lord Chamberlain, or if licensed by the county or borough council under the enactments relating to theatre, music and dancing licences; and (2) in other cases by the police authority (*g*). Legal proceedings.

SUB-SECT. 5.—*School Attendance.*

406. A person who habitually wanders from place to place taking with him a child above the age of five is liable on summary conviction to a fine (*h*) unless he proves that the child (1) is totally exempted from school attendance, or (2) is not by being so taken prevented from receiving efficient elementary education (*i*). Such a person, for the purposes of the provisions of the Children Act, 1908, relating to the description of children who may be sent to a certified industrial school, is deemed not to be exercising proper guardianship over the child (*k*). Vagrancy.

Children in canal boats for whose education provision is made Exemptions.

(*a*) Children Act, 1908 (8 Edw. 7, c. 67), s. 116.
(*b*) *Ibid.*, s. 121 (6).
(*c*) *Ibid.*, s. 121 (1).
(*d*) *Ibid.*, s. 121 (2).
(*e*) *Ibid.*, s. 121 (4).
(*f*) *Ibid.*, s. 121 (3); and see title THEATRES AND OTHER PLACES OF ENTERTAINMENT. As to procedure in courts of summary jurisdiction, see title MAGISTRATES.
(*g*) Children Act, 1908 (8 Edw. 7, c. 67), s. 121 (5).
(*h*) Not exceeding with costs 20*s.* (*ibid.*, s. 118 (1)).
(*i*) *Ibid.*
(*k*) *Ibid.* See pp. 151, 165, *ante*.

SECT. 6. **Other Offences in respect of Children etc.**

under the Canal Boats Act, 1877 (*l*), are not within the scope of the rule last stated (*m*). Nor, subject to the statutory requirements as to school attendance (*n*), does the rule apply during the months of April to September inclusive, to any child whose parent or guardian is engaged in a trade or business of such a nature as to require him to travel from place to place, and who has obtained a certificate of having made not less than 200 attendances at a public elementary school during the months of October to March immediately preceding (*o*).

Apprehension of vagrant.

A constable who finds a vagrant taking a child about with him may, if he has reasonable ground for believing that the person is guilty of an offence under the above rule, apprehend him without a warrant, and may take the child to a place of safety (*p*).

SUB-SECT. 6.—*Neglect in Cleansing of Children.*

Cleansing of child and clothing.

407. A local education authority may direct its medical officer (*q*), or his delegate, to examine the person and clothing of any child (*r*) attending a "provided" school. If the person or clothing of the child is found to be infected with vermin or in a foul condition, the local education authority may give notice in writing to the parent or guardian or other person liable to maintain the child, requiring him to cleanse the person and clothing of the child within twenty-four hours (*s*), and shall furnish the person notified with written instructions describing the best method of cleansing (*t*).

Cleansing by authority.

If the notice is not complied with, the medical officer, or his delegate, may without warrant remove the child from the school and cause his person and clothing to be properly cleansed in suitable premises (*u*). A parent, guardian, or other person liable to maintain a child who allows a child who has been cleansed by a local education authority to get into such a condition that the local education authority has again to take similar measures, is liable on summary conviction to a fine not exceeding ten shillings (*v*).

(*l*) 40 & 41 Vict. c. 60. See title EDUCATION, Vol. XII., p. 67.
(*m*) Children Act, 1908 (8 Edw. 7, c. 67), s. 118 (1).
(*n*) See title EDUCATION, Vol. XII., pp. 55 *et seq.*
(*o*) Children Act, 1908 (8 Edw. 7, c. 67), s. 118 (3).
(*p*) *Ibid.*, s. 118 (2). As to the meaning of "place of safety," see note (*w*), p. 164, *ante*.
(*q*) "Medical officer" means any officer appointed for the purpose of the Education (Administrative Provisions) Act, 1907 (7 Edw. 7, c. 43), s. 13 (Children Act, 1908 (8 Edw. 7, c. 67), s. 122 (7)).
(*r*) In the case of girls the examination and cleansing must be effected by a duly qualified medical practitioner (see title MEDICINE AND PHARMACY) or a duly authorised woman (Children Act, 1908 (8 Edw. 7, c. 67), s. 122 (6)).
(*s*) *Ibid.*, s. 122 (1).
(*t*) *Ibid.*, s. 122 (5).
(*u*) *Ibid.*, s. 122 (2). Premises provided by the sanitary authority (as to which see title PUBLIC HEALTH AND LOCAL ADMINISTRATION) may be used for this purpose upon an agreed payment (*ibid.*, s. 122 (3)).
(*v*) Children Act, 1908 (8 Edw. 7, c. 67), s. 122 (4).

SECT. 7. *Juvenile Smoking.*

SECT. 7. Juvenile Smoking.

Sale of tobacco.

408. A person selling cigarettes (*w*), or cigarette papers, or smoking mixtures intended as a substitute for tobacco (*a*), to anyone apparently under sixteen years of age, whether for his own use or not, is liable to a fine (*b*) on summary conviction (*c*). This rule applies also to the sale of tobacco other than cigarettes, except that a person is not guilty of an offence for selling tobacco to a person apparently under the age of sixteen years if he did not know, and had no reason to believe, that it was for the use of that person (*d*).

Automatic machines.

409. Where it is proved to a court of summary jurisdiction that an automatic machine for the sale of cigarettes is being extensively used by children or young persons, the court may order the owner of the machine, or the person on whose premises it is kept, to take certain precautions against such user, or to remove the machine (*e*). An appeal lies from such an order to quarter sessions (*f*).

Seizure of tobacco.

410. It is the duty of a constable and of a park-keeper, in uniform, to seize cigarettes (*g*), and cigarette papers, in the possession of any person apparently under the age of sixteen years, whom he finds smoking in any street or public place. Boys found smoking may be searched, but not girls (*h*).

Exemptions.

411. The provisions which make it an offence to sell cigarettes or cigarette papers, and which authorise seizure of such articles, do not apply where the purchaser, or the person in whose possession they are found, is at the time employed by a manufacturer of or dealer in tobacco, either wholesale or retail, for the purposes of his business, or is a boy messenger in uniform in the employment of a messenger company and employed as such at the time (*i*).

(*w*) Including cut tobacco rolled up in paper, tobacco leaf, or other material in such form as to be capable of immediate use for smoking (Children Act, 1908 (8 Edw. 7, c. 67), s. 43 (1)).

(*a*) *Ibid.*, s. 43 (3).

(*b*) *Ibid.*, s. 39. The fine for a first offence must not exceed £2, for a second, £5, and for a third or subsequent offence, £10; as to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES.

(*c*) Children Act, 1908 (8 Edw. 7, c. 67), s. 39.

(*d*) *Ibid.*, s. 43 (2).

(*e*) *Ibid.*, s. 41 (1). Failure to comply with such order is punishable by fine (*ibid.*, s. 41 (2)); as to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES.

(*f*) Children Act, 1908 (8 Edw. 7, c. 67), s. 41 (1). As to such appeals, see title MAGISTRATES.

(*g*) See note (*w*), *supra*.

(*h*) Children Act, 1908 (8 Edw. 7, c. 67), s. 40, which provides for the proper disposal of articles seized.

(*i*) *Ibid.*, s. 42.

Part XI.—Offences by Children and Young Persons.

SECT. 1. **Release of Children and Young Persons on Bail.**

SECT. 1.—*Release of Children and Young Persons on Bail* (*k*).

Release on bail.

412. A person apparently under the age of sixteen (*l*) who has been arrested with or without warrant, and who cannot be brought immediately before a court of summary jurisdiction (*m*), may in any case be released on bail by the police authority (*n*). Bail must be granted unless (1) the charge is one of homicide or other grave crime, or (2) it is necessary in the interests of the alleged offender to remove him from association with any reputed criminal or prostitute, or (3) the police officer has reason to believe such release would defeat the ends of justice (*o*).

SECT. 2.—*Custody where Bail refused.*

Detention of person charged.

413. Where a person apparently under sixteen is not admitted to bail, he must be detained in a place of detention (*p*) until he can be brought before a court of summary jurisdiction, unless the police officer who refuses bail certifies (1) that such a course is impracticable, (2) that the person charged is of so unruly a character that he cannot be safely so detained, or (3) that the state of his health or mental or bodily condition render his detention inadvisable. The certificate must be produced to the court before which the person charged is brought (*q*).

Association with adults during detention.

The police authority must so far as practicable prevent children and young persons, during detention, from associating with adults, other than relatives, charged with an offence (*r*).

Custody on committal.

414. A court of summary jurisdiction (*s*), on remanding or committing for trial a child or young person who is not released on bail, must, as a rule, instead of committing him to prison commit him to custody in a place of detention during remand or until delivery in due course. This rule is not applicable in the case of a person certified by the court to be of so unruly a character that he cannot be safely so committed, or of so depraved a character that he is not fit to be so detained. On similar grounds, a commitment

(*k*) As to the capacity of an infant in regard to crime, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 239, 240.

(*l*) As to presumption and determination of age, see Children Act, 1908 (8 Edw. 7, c. 67), s. 123; and p. 153, *ante*.

(*m*) As to such courts, see title MAGISTRATES.

(*n*) See title POLICE.

(*o*) Children Act, 1908 (8 Edw. 7, c. 67), s. 94; see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 38. As to bail generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 323.

(*p*) For provision of "place of detention," see Children Act, 1908 (8 Edw. 7, c. 67), s. 108; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 422.

(*q*) Children Act, 1908 (8 Edw. 7, c. 67), s. 95.

(*r*) *I bid.*, s. 96.

(*s*) As to such courts, see title MAGISTRATES.

to custody in a place of detention may be varied or revoked, and if revoked the young person concerned may be committed to prison (*t*).

SECT. 3.—*Attendance at Court of Parent.*

Attendance at court of parent or guardian.

415. Where a child or young person is charged with any offence, or where a child is brought before a petty sessional court (*u*) on an application for an order to send him to a certified industrial school, the court has discretion to require the attendance during all the stages of the proceedings of the parent or guardian. If the parent or guardian can be found, and resides within a reasonable distance, the court must, unless satisfied that it would be unreasonable, require such attendance (*a*).

Notice to attend.

Warning to the parent or guardian to attend must be given by the police on the arrest of a child or young person (*b*).

Attendance enforced.

The attendance may be enforced by rules made under the Summary Jurisdiction Act, 1879 (*c*).

SECT. 4.—*Punishment of Children and Young Persons* (*d*).

Fine payable by parent.

416. In certain cases the court has power to order a parent or guardian to pay a fine, damages or costs, on account of an offence committed by a child or young person (*e*).

Fine payable by child or young person: costs.

417. Where a child or young person is himself ordered to pay costs in addition to a fine, the costs may in no case exceed the amount of the fine (*f*).

Places of detention.

418. Police authorities must provide places of detention for the custody of juvenile offenders (*g*), and provision is also made for expenses of maintenance of such offenders while so detained (*h*).

(*t*) Children Act, 1908 (8 Edw. 7, c. 67), s. 97.

(*u*) As to such courts, see title MAGISTRATES.

(*a*) Children Act, 1908 (8 Edw. 7, c. 67), s. 98 (1). The parent or guardian whose attendance may be required must be the parent or guardian in actual possession or control of the child or young person. If that person is not the father, his attendance may also be required (*ibid.*, s. 98 (4)). The attendance of a parent from whose charge a child or young person has been removed by an order of a court of justice may not be required (*ibid.*, s. 98 (5)).

(*b*) *Ibid.*, s. 98 (2).

(*c*) 42 & 43 Vict. c. 49, s. 29; Children Act, 1908 (8 Edw. 7, c. 67), s. 98 (3); see Summary Jurisdiction (Children Act) Rules, 23rd March, 27th May, 1909, [1909] W. N., Part II., pp. 111, 269.

(*d*) See, as to punishments of youthful offenders, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 418, 420, 425; for summary trial of children, *ibid.*, *passim*; and for Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), *ibid.*, pp. 413, 425. As to courts of summary jurisdiction, see title MAGISTRATES.

(*e*) Children Act, 1908 (8 Edw. 7, c. 67), s. 99 (1). For further details, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 424, 437.

(*f*) Children Act, 1908 (8 Edw. 7, c. 67), s. 101.

(*g*) *Ibid.*, s. 108. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 422, note (*d*).

(*h*) Children Act, 1908 (8 Edw. 7, c. 67), ss. 109, 110. See also the Rules made 21st May, 1909, for places of detention under s. 108; Statutory Rules and Orders, 1909, No. 591.

SECT. 5.
Juvenile Courts.

SECT. 5.—*Juvenile Courts.*

Juvenile courts.

419. A court of summary jurisdiction (*i*) must sit either in a different building or room from that in which the ordinary sittings of the court are held, or on different days or at different times, when hearing (1) charges against children or young persons, or (2) applications for orders or licences relating to a child or young person at which the attendance of the child or young person is required. This rule does not apply where a child or young person is charged jointly with an adult. Courts so sitting are called juvenile courts (*j*).

Trial of adults in juvenile courts, and of juveniles in other than juvenile courts.

If, in the course of proceedings in a juvenile court, it appears that the person to whom the proceedings relate is sixteen or more years of age, the court has discretion to proceed with the case if it thinks it is undesirable to adjourn it. It has a similar discretion where in the course of proceedings in any court of summary jurisdiction other than a juvenile court, it appears that the person concerned is under the age of sixteen (*k*).

Juvenile offenders not to associate with adult offenders.

420. Provision must be made for preventing persons apparently under the age of sixteen whilst being conveyed to or from court, or whilst waiting before or after their attendance in court, from associating with adults charged with any offence other than an offence with which the person apparently under the age of sixteen years is jointly charged (*l*).

Exclusion of public from juvenile courts.

The public, other than *bonâ fide* representatives of a newspaper or news agency, are to be excluded from a juvenile court except by leave of the court (*m*).

(*i*) As to courts of summary jurisdiction, see title MAGISTRATES.

(*j*) Children Act, 1908 (8 Edw. 7, c. 67), s. 111 (1). As to the establishing of juvenile courts by Order in Council under the Metropolitan Police Courts Acts, 1839 and 1840 (2 & 3 Vict. c. 47; 3 & 4 Vict. c. 84), see Children Act, 1908 (8 Edw. 7, c. 67), s. 111 (5), (6).

(*k*) *Ibid.*, s. 111 (2).

(*l*) *Ibid.*, s. 111 (3).

(*m*) *Ibid.*, s. 111 (4).

INFECTIOUS DISEASES.

See ANIMALS; INNS AND INNKEEPERS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

INFERIOR COURTS.

See COUNTY COURTS; COURTS; JUDGMENTS AND ORDERS.

INFORMATION.

See CRIMINAL LAW AND PROCEDURE; CROWN PRACTICE; MAGISTRATES.

INFORMATION AND BELIEF.

See EVIDENCE.

INFORMER.

See CRIMINAL LAW AND PROCEDURE; MAGISTRATES.

INFRINGEMENT.

See COPYRIGHT AND LITERARY PROPERTY; INJUNCTION.

INGRESS, EGRESS, AND REGRESS.

See EASEMENTS AND PROFITS À PRENDRE; TRESPASS.

INHABITED HOUSE DUTY.

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For Income Tax	*See title* INCOME TAX.
Practice on the Revenue Side of the King's Bench Division	,, CROWN PRACTICE.
Revenue Authorities	,, CONSTITUTIONAL LAW; REVENUE.

SECT. 1.—*Subject-matter of the Duty.*

421. The Inhabited House Duty is under the care and management of the Commissioners of Inland Revenue (*a*), the assessment

Nature and administration of the duty.

(*a*) House Tax Act, 1851 (14 & 15 Vict. c. 36), ss. 1, 2; and see title INCOME TAX, Vol. XVI., p. 612. Unlike the income tax, this duty does not extend to Ireland. A duty upon inhabited houses was first imposed in the year 1778 by the stat. (1778) 18 Geo. 3, c. 26, and, together with a window tax, remained in force under various statutes until 1834, when it was repealed by the House Tax Act, 1834 (4 & 5 Will. 4, c. 19), the window tax being retained. In 1851 the window tax was repealed and the duty on inhabited houses reimposed (House Tax Act, 1851 (14 & 15 Vict. c. 36), s. 1). By the House Tax Act, 1851 (14 & 15 Vict. c. 36), it was in substance provided (*ibid.*, s. 2) that all the powers, provisions, rules, regulations and directions contained (1) in any Act then in force relating to the duties of assessed taxes (as to which see now the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 7), and (2) in any Act which was in force when the tax was repealed as above mentioned in 1834, should again be in force as far as the same were applicable to and not inconsistent with the House Tax Act, 1851 (14 & 15 Vict. c. 36). The statutory provisions anterior to the House Tax Act, 1851 (14 & 15 Vict. c. 36), which were revived thereby, are as follows:—House Tax Act, 1803 (43 Geo. 3, c. 161), ss. 10 15,

SECT. 1. Subject-matter of the Duty.

of the duty being in the hands of the Commissioners for the general purposes of the Income Tax and Inhabited House Duties, commonly called the General Commissioners.

The duty is, with certain exceptions hereinafter mentioned, imposed upon the occupiers for the time being of inhabited dwelling-houses in Great Britain of the value of £20 and upwards (*b*).

What constitutes an inhabited dwelling-house.

422. It will be seen that for the purpose of the duty, certain accessories to dwelling-houses are to be valued with them, and also that, in certain cases, tenements which in ordinary parlance would be considered as portions only of a single house are to be treated as a separate unit (*c*). Apart from these provisions there is no definition of what constitutes a dwelling-house, and the term would appear to be used in the popular sense. Houses in a row or semi-detached are separately assessable, and it would seem that separately occupied tenements under one roof, but structurally separate throughout and having separate entrances from the street, constitute separate houses (*d*).

A house furnished and ready for occupation as an ordinary dwelling-house with sleeping accommodation is chargeable, notwithstanding that during the year of assessment no person has in fact occupied it (*e*).

Sleeping accommodation, whether essential.

423. A hall or office, and a building which is assessable as an accessory to an inhabited dwelling-house (*f*), is chargeable, though it has no sleeping accommodation (*g*), but with regard to

17, 55, 59, 60, 62, 77 (all in part only); House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. A, r. 5, Sched. B, rr. 1—14 (both inclusive), and exemption cases 1, 4, 5; House Tax Act, 1817 (57 Geo. 3, c. 25), s. 2 (in part); House Tax Act, 1825 (6 Geo. 4, c. 7), ss. 2, 3 (in part); House Tax Act, 1832 (2 & 3 Will. 4, c. 113), s. 3. The other statutory provisions now in force are :—House Tax Act, 1851 (14 & 15 Vict. c. 36), ss. 1 (in part), 2 (in part), 3 and Schedule; Revenue Act, 1867 (30 & 31 Vict. c. 90), s. 25; House Tax Act, 1871 (34 & 35 Vict. c. 103), s. 31; Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13; Taxes Management Act, 1880 (43 & 44 Vict. c. 19); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 23, 24; Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), ss. 25, 26 (s. 26 (2) (*ibid.*) is retained only for the purpose of the provisions of the Revenue Act, 1903 (3 Edw. 7, c. 46), referred to below); Customs and Inland Revenue Act, 1891 (54 & 55 Vict. c. 25), s. 4; Finance Act, 1901 (1 Edw. 7, c. 7), s. 13; Finance Act, 1902 (2 Edw. 7, c. 7); Revenue Act, 1903 (3 Edw. 7, c. 46), ss. 11, 17 and Schedule; Finance Act, 1906 (6 Edw. 7, c. 8), s. 6.

(*b*) House Tax Act, 1851 (14 & 15 Vict. c. 36), s. 1, and Schedule; House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 1. As to what constitutes occupation, see cases cited in title INCOME TAX, Vol. XVI., p. 631, note (*r*); and *Swain* v. *Fleming* (1899), 81 L. T. 202; *Cooper* v. *Rose* (1907), 97 L. T. 337; *Foster* v. *Athenæum Newsroom and Library, Liverpool* (1907), 97 L. T. 692.

(*c*) See pp. 183, 184, *post.*

(*d*) *Grant* v. *Langston*, [1900] A. C. 383, *per* Lord HALSBURY, L.C., at p. 392. The question of what constitutes a house is discussed in *A.-G.* v. *Mutual Tontine Westminster Chambers Association* (1876), 1 Ex. D. 469, C. A., and in the cases referred to in note (*a*), p. 193, *post.* See also *Murdochs* v. *Inland Revenue* (1904), 7 F. (Ct. of Sess.) 111; *Knight* v. *Manley* (1905), 92 L. T. 506.

(*e*) *Smith* v. *Dauney*, [1904] 2 K. B. 186.

(*f*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, rr. 2, 5; and see p. 183, *post.*

(*g*) *Styles* v. *Middle Temple* (*Treasurer*) (1899), 68 L. J. (Q. B.) 1046, C. A.

other houses it is doubtful whether, if they are used in the day only, and are unprovided with sleeping accommodation, they are chargeable (*h*). A building used in part as a working man's club and in part as an auctioneer's office, there being no sleeping accommodation and no one in fact sleeping there, is, it seems, not chargeable (*i*), and a gymnasium, library, chapel, or swimming bath used in connection with a school-house, but in a different occupation, is not chargeable (*k*).

What accessory buildings and premises are chargeable.

424. For the purposes of the duty every coachhouse, stables, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy and all other offices, and all yards, courts and curtilages, and gardens or pleasure grounds belonging to and occupied with any dwelling-house are to be valued together with it, provided that no more than one acre of such gardens and pleasure grounds shall in any case be so valued (*l*). Market gardens and nursery grounds occupied by a market gardener or nurseryman *bonâ fide* for the sale of the produce thereof in the way of his trade or business are not to be included in the valuation of the dwelling-house, and are consequently exempt from the duty (*m*).

Meaning of "all other offices."

A wide interpretation has been given to the expression "all other offices" in the preceding paragraph. It would seem that any buildings adjoining a dwelling-house, which are occupied by and used for the purpose of the business or vocation of the occupier of the dwelling-house, are included in the term (*n*), and that the rule is not confined to cases in which the dwelling-house is the principal thing and the office merely accessory (*o*).

(*h*) Opinions in the affirmative were expressed in *Re Cowan and Strachan, Re Scottish Widows Fund* (No. 2) (1880), 1 Tax Cas. 245, by the LORD PRESIDENT at p. 251; and in *Glasgow Corporation* v. *Inland Revenue* (1880), 8 R. (Ct. of Sess.) 17; and by BRAMWELL, B., in *Rusby* v. *Newson* (1875), L. R. 10 Exch. 322. Opinions in the negative were expressed by KELLY, C.B., in *Riley* v. *Read* (1879), 4 Ex. D. 100; and by WRIGHT, J., in *Clifton College* v. *Tompson*, [1896] 1 Q. B. 432, and *Charterhouse School* v. *Gayler*, [1896] 1 Q. B. 437. Upon this question the recital in the (now repealed) House Tax Act, 1817 (57 Geo. 3, c. 25), should be considered.

(*i*) *Riley* v. *Read, supra.*

(*k*) *Clifton College* v. *Tompson, supra; Charterhouse School* v. *Gayler, supra.*

(*l*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 2.

(*m*) House Tax Act, 1851 (14 & 15 Vict. c. 36), s. 3.

(*n*) *Browne* v. *Furtado*, [1903] 1 K. B. 723, C. A., *per* STIRLING, L.J., at p. 732.

(*o*) *Lambton* v. *Kerr*, [1895] 2 Q. B. 233, *per* CHARLES, J., at p. 238. Where three houses, each under £20 in value and having no internal communication with each other, were occupied by the huntsman, whip, and groom of a hunt, and, together with stables, kennels, yards, houses, and an exercising yard of 3¼ acres, were held on lease at one rent, and used for the purposes of a hunt, it was held that the entire premises were chargeable as one subject (*Cheape* v. *Kinmont* (1888), 16 R. (Ct. of Sess.) 144). A trainer's premises, consisting of a dwelling-house for the "head lad," a garden, training yard, ranges of stables, and saddle-rooms, over which stable lads slept, were held to be chargeable as one subject (*Lambton* v. *Kerr, supra*). Stables occupied by an hotel-keeper for the purposes of his business were held to be chargeable as one subject with the hotel, although they were separated from the hotel by a yard (*Swain* v. *Fleming* (1899), 81 L. T. 202; and see *Douglas* v. *Young* (1879), 7 R. (Ct. of Sess.) 229). In *Browne* v. *Furtado, supra*, a school comprised, in addition to the school-houses where the masters and boys slept, an unconsecrated

SECT. 1.
Subject-matter of the Duty.

425. With certain exceptions, shops and warehouses attached to a dwelling-house or having any communication therewith are to be valued with the dwelling-house and the household and other offices aforesaid thereunto belonging (*p*).

Shops and warehouses.

426. Every chamber or apartment in any of the Inns of Court, or of Chancery, or in any college or hall in any of the universities of Great Britain, being severally in the occupation of any person or persons, is to be charged as one entire house, and the duty is charged upon the occupier of such chamber or apartment (*q*).

Chambers of Inns of Court, universities etc.

Halls etc.

427. Every hall or office chargeable with any other taxes or parish rates is subject to the duty, and such duty is payable by the person to whom the same belongs (*r*).

Flats etc.

428. Houses let in different storeys, tenements, lodgings, or landings, inhabited by two or more persons or families, are to be

chapel, a play-room, gymnasium, class-rooms, carpenter's shop, closets, urinals, and dressing-rooms, all of which were separated from the school-house and playground by a wall, access to them from the school being obtained by means of a door through the wall, which door was connected with the school by a covered passage. It was held that, although the connection of the accessory buildings with the school-house by means of the covered passage did not constitute them one dwelling-house with the school-house, nevertheless such accessory buildings came within the House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 2, and were chargeable as one subject with the school-house. See also *Foster* v. *Athenæum Newsroom and Library, Liverpool* (1907), 97 L. T. 692; *Inland Revenue* v. *Edinburgh Corporation* (1903), 5 F. (Ct. of Sess) 875. The observations of WRIGHT, J., in *Clifton College* v. *Tompson*, [1896] 1 Q. B. 432, appear to be inconsistent with the judgment in *Browne* v. *Furtado*, [1903] 1 K. B. 723, C. A. Premises which, although accessory to a dwelling-house, are occupied by a person other than the occupier of the dwelling-house, do not come within the rule (*Clifton College* v. *Tompson, supra; Charterhouse School* v. *Gayler*, [1896] 1 Q. B. 437).

(*p*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 3. The rule excepts "warehouses and buildings upon or near adjoining to wharfs which are occupied by persons who carry on the business of wharfingers and who have dwelling-houses upon the said wharfs for the residence of themselves or servants employed upon the said wharfs" (*ibid.*). And the rule does not apply to "such warehouses as are distinct and separate buildings and not parts or parcels of such dwelling-house, or the shops attached thereto, but employed solely for the purpose of lodging goods, wares and merchandise, or for carrying on some manufacture (notwithstanding the same may adjoin or have communication with the dwelling-house or shop)" (*ibid.*). As to these and other exemptions affecting shops and warehouses, see pp. 191—195, *post*.

(*q*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 4. Chambers in the Inns of Court and Chancery and in colleges and halls of the universities are self-contained tenements in a building. They differ from ordinary flats, inasmuch as they have no outer door into the street and there is no visible control of the staircase by the landlord. It is not clear how chambers which correspond in these particulars with those referred to in Sched. B, r. 4 (*ibid.*), but which are not situated in an Inn of Court or Chancery or in a college or hall of a university, should be dealt with in respect of Inhabited House Duty.

(*r*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 5. The Middle Temple Hall, which is used during the day only, no one sleeping there, comes within the rule; but the Middle Temple Library does not (*Styles* v. *Middle Temple* (*Treasurer*) (1899), 68 L. J. (Q. B.) 1046, C. A.). The Free Church Assembly Hall, Edinburgh, a room used for meetings of the General Assembly of the Free Church of Scotland, together with adjoining class-rooms, gymnasium and museum, has been held to be chargeable under this rule (*Free Church of Scotland* (*General Trustees*) v. *Inland Revenue* (1897), 24 R. (Ct. of Sess.) 492); as have also art galleries and museums at Glasgow (*Glasgow Corporation* v. *Inland Revenue* (1880), 8 R. (Ct. of Sess.) 7).

SECT. 1. Subject-matter of the Duty.

charged as though inhabited by one person or family only, and the landlord or owner is to be deemed to be the occupier and to be charged with the payment of the duty (*s*). When, however, the landlord does not reside within the limits of the collector, or in case the duty remains unpaid by such landlord for twenty days after it is due, such duty may be demanded of and levied upon the tenant or occupier, who on payment is entitled to deduct the amount from his next payment of rent (*t*).

Flats etc. forming distinct properties.

Where dwelling-houses are divided into different tenements being distinct properties, each tenement is to be charged to the occupier thereof as though it were an entire house (*a*).

SECT. 2.—*Rates at which the Duty is Chargeable.*

Rates applicable to shops, hotels, farmhouses, registered lodging-houses etc.

429. The rates of duty chargeable are as follows (*b*) :—

(1) In the case of shops and warehouses attached to dwelling-houses (*c*), hotels, inns, public-houses, and coffee-houses (whether

(*s*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 6. As to the meaning of this rule, see *A.-G.* v. *Mutual Tontine Westminster Chambers Association* (1876), 1 Ex. D. 469, C. A., and note (*a*), p. 193, *post*. The rule, of course, does not apply to the chambers and apartments mentioned in the House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 4, and it is doubtful whether it applies to chambers of a similar kind to those mentioned in that rule (see note (*q*), p. 184, *ante*), or to two tenements under one roof of a kind similar to that which was in question in *Grant* v. *Langston*, [1900] A. C. 383. It will be seen that in many cases separate tenements forming portions of a house are, if used for purposes of trade, excluded from the House Tax Act, 1808 (48 Geo. 3. c. 55), Sched. B, r. 6 ; see pp. 191 *et seq.*, *post*, where the subject of houses let in separate tenements is treated generally and the cases are cited.

(*t*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 6 ; and see House Tax Act, 1803 (43 Geo. 3, c. 161), s. 55 ; and title LANDLORD AND TENANT.

(*a*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 14. In *A.-G.* v. *Mutual Tontine Westminster Chambers Association*, *supra*, it was held that a single building under one roof, owned by one person and let out in self-contained flats, each flat having access to the street by a staircase used in common with the other flat owners, the staircase and outer door to the street being under the control of the landlord, did not fall to be charged under this rule, mainly upon the ground that the several flats being in the same ownership did not constitute "distinct properties," and consequently that the whole building was chargeable as a single unit under the House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 6. If, however, the freehold of the several flats had been vested in different owners it seems they would have fallen within the rule and have been chargeable separately. It was partly this decision which led to the passing of the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13 ; see p. 192, *post*.

(*b*) See House Tax Act, 1851 (14 & 15 Vict. c. 36), Sched. Under this schedule, hotels etc. not licensed for the sale of excisable liquors, were not included in the category of tenements chargeable at the lower rate, nor were lodging-houses; and the uniform rate in respect of all tenements chargeable at the lower rate was 6*d*. in the £, whilst the rate chargeable in respect of all other tenements was 9*d*. in the £. By the House Tax Act, 1871 (34 & 35 Vict. c. 103), s. 31, the benefit of the lower rate was extended to hotel keepers etc., who were not licensed for the sale of excisable liquors. By the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 26 (1), the benefit of the lower rate was extended to registered lodging-house keepers (see note (*f*), p. 186, *post*) ; and by the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 25, the respective rates of 6*d*. and 9*d*. in the £ were modified and graduated as set forth in the text.

(*c*) House Tax Act, 1851 (14 & 15 Vict. c. 36), Sched. The words are

SECT. 2. Rates at which the Duty is Chargeable.

licensed for the sale of excisable liquors or not) (*d*), farmhouses, occupied by tenants or farm servants and *bonâ fide* used for the purposes of husbandry only (*e*), and lodging-houses the keepers whereof are duly registered by the Commissioners of Inland Revenue (*f*), where the annual value, including the household and other offices, yards and gardens thereunto occupied and charged (*g*), amounts to £20 and does not exceed £40, the duty is 2*d.* in the £; where such annual value exceeds £40 but does not exceed £60, the duty is 4*d.* in the £; where such annual value exceeds £60, the duty is 6*d.* in the £ (*h*).

Rates applicable to other houses.

(2) In the case of chargeable tenements which are not within the above category, where such annual value amounts to £20 and does not exceed £40, the duty is 3*d.* in the £; where such annual value exceeds £40 but does not exceed £60, the duty is 6*d.* in the £; where such annual value exceeds £60, the duty is 9*d.* in the £ (*h*).

Tenements of less than £20 value.

Tenements the annual value of which, together with the adjuncts above mentioned, is less than £20, are not chargeable.

SECT. 3.—*Assessment of the Duty.*

SUB-SECT. 1.—*Method of Assessment.*

The General Commissioners and their officers.

430. The Commissioners for executing the Acts relating to the Inhabited House Duty are the Commissioners for the general purposes of the Income Tax and House Duties (commonly called

"Where any such dwelling-house shall be occupied by any person in trade who shall expose to sale and sell any goods, wares, or merchandise in any shop or warehouse, being part of the same dwelling-house, and in the front and on the ground or basement storey thereof." Compare House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 3, p. 184, *ante*. And see, as to the meaning of "shops" and "warehouses" respectively, p. 191, *post*.

(*d*) House Tax Act, 1851 (14 & 15 Vict. c. 36), Sched., extended to hotels etc. not licensed for the sale of excisable liquor by the House Tax Act, 1871 (34 & 35 Vict. c. 103), s. 31. In order that licensed premises may be chargeable with the lower duty, it would seem that the occupier must be the person who is duly licensed; and where a building is let out in two tenements, one as a club and the other as a licensed hotel, the landlord being chargeable for the whole (House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 6), he is chargeable at the higher rate (*Inland Revenue* v. *Campbell* (1899), 2 F. (Ct. of Sess.) 244. As to licensed premises generally, see title INTOXICATING LIQUORS.

(*e*) House Tax Act, 1851 (14 & 15 Vict. c. 36), Sched.

(*f*) Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 26 (1) by which the benefit of the lower rate is extended to dwelling-houses occupied by a person for the main purpose of letting furnished lodgings therein as a means of livelihood upon application by such person to the Commissioners of Inland Revenue, made after registering his name in a list of lodging-house keepers to be kept by them. A hydropathic establishment which receives patients as well as ordinary guests is not a lodging-house within the section and is chargeable at the higher rate (*Strathearn Hydropathic Co., Ltd.* v. *Inland Revenue* (1881), 8 R. (Ct. of Sess.) 798, decided on the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 31).

(*g*) Not more than one acre of garden or pleasure ground is to be valued and charged together with the dwelling-house (House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 2). Market gardens or nursery gardens, if occupied by a market gardener or nurseryman *bonâ fide* for the sale of the produce thereof in the way of his trade, are not to be included (House Tax Act, 1851 (14 & 15 Vict. c. 36), s. 3.

(*h*) *Ibid.*, Sched.; Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 25.

SECT. 3. Assessment of the Duty.

the General Commissioners) or any two or more of them acting in their respective districts, and they are assisted in the performance of their duties by a clerk, assessors, inspectors, surveyors and collectors (*i*).

Their functions and duties in non-metropolitan districts.

In districts outside the metropolis the assessors, or, in their default, the surveyors, and inspectors, are required to assess and deliver a certificate of every dwelling-house, cottage, or tenement of whatever description within their district, of the annual rent of £20 and upwards, and to include in the assessment houses or tenements that are then unoccupied (*k*).

Inspection.

For this purpose they have power at seasonable times, but not more than twice a year, to view and examine each dwelling-house, taking to their assistance, when necessary, a constable, headborough, tithing man, or other officer of the parish or place, who is required to assist them (*l*).

Passing of assessments.

These assessments when brought in are considered by the Commissioners, and if necessary amended, and are then signed and allowed by them (*m*).

Procedure within the metropolitan district as defined by the Valuation (Metropolis) Act, 1869.

This procedure, however, is not applicable to districts to which the Valuation (Metropolis) Act, 1869 (*n*), applies. In such districts the gross value of a house stated in the valuation list, for the time being in force therein, is deemed to be the full and just yearly rent thereof for the purpose of the Acts relating to the Inhabited House Duty (*o*), and consequently the Commissioners have no functions to exercise in regard to valuation. In these districts the functions of the assessors are performed by the surveyors (*a*).

"Gross value."

The gross value above mentioned is defined to mean the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command the rent (*b*).

Period during which assessments remain in force.

431. The valuation list for the districts comprised within the Valuation (Metropolis) Act, 1869 (*c*), continues in force for five years from the 6th April in the year succeeding that in which it

(*i*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 5 (1), 27 (1). For the mode of appointment of the commissioners and the officers mentioned, and their qualifications and duties, see title INCOME TAX, Vol. XVI., pp. 612, 613 *et seq.*

(*k*) House Tax Act, 1803 (43 Geo. 3, c. 161), ss. 10, 15; see also Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 49, 50. The penalty for neglect of this duty is a sum not exceeding £20, and not less than £5 (House Tax Act, 1803 (43 Geo. 3, c. 161), s. 10).

(*l*) *Ibid.*, s. 60.

(*m*) *Ibid.*, s. 62; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 49, 50.

(*n*) 32 & 33 Vict. c. 67.

(*o*) Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 45; and see title INCOME TAX, Vol. XVI., p. 620.

(*a*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 43.

(*b*) Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 4.

(*c*) 32 & 33 Vict. c. 67.

SECT. 3. Assessment of the Duty.

is made, subject to any alterations that may be made by any supplemental or provisional list (*d*).

Outside the metropolis.

In districts outside the metropolis the valuation is nominally made for the current year only; but in practice it also is usually quinquennial, a provision being inserted in the Finance Act of each of the four years subsequent to the year in which the assessment is made, which enacts that the value adopted for the previous year shall be the value for the current year, and the value so adopted for these years cannot during that period be questioned by appeal (*e*). During these subsequent years the inspectors and surveyors are the persons who certify the assessment to the Commissioners (*f*).

The financial year. When duty payable.

In England the assessment is made for the year commencing on the 6th April to the following 5th April, inclusive (*g*). It is payable on or before the 1st January in the year of assessment (*h*).

SUB-SECT. 2.—*Principle of Valuation.*

Assessment value of a tenement, how and by whom ascertained.

432. In districts comprised within the Valuation (Metropolis) Act, 1869 (*i*), the value of a tenement for the purposes of the duty is, as already stated (*k*), the gross value appearing in the valuation list for the time being. In districts not so comprised the value to be taken is, similarly, the full annual or rental value of the house, together with such accessory tenements as are assessable with it, and not the net or poor rate value (*l*).

Basis of assessment.

The assessor is to make his assessment from the best information he can obtain of the annual value of the dwelling-house, which in all cases is to be the actual amount of the rent at which the houses are let, or if not let, the rent which it is worth to be let by the year (*m*).

Effect of poor rate assessment.

For this purpose neither the gross nor the net annual value appearing in the current valuation list for the poor rate is binding either upon the Crown or upon the person assessed, though the former is often in practice followed (*n*).

(*d*) Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 43.

(*e*) See, *e.g.*, Finance Act, 1906 (6 Edw. 7, c. 8), s. 6 (3); *Turner* v. *Carlton*, [1909] 1 K. B. 932.

(*f*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 30.

(*g*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 48.

(*h*) *Ibid.*, s. 82.

(*i*) 32 & 33 Vict. c. 67.

(*k*) See p. 187, *ante*, and title INCOME TAX, Vol. XVI., p. 620.

(*l*) *Walker* v. *Brisley*, *Grinter* v. *Fleming*, [1900] 2 Q. B. 735. In these cases the statutory powers of valuation are fully discussed; the decisions were principally based upon the initial words of the House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, and upon r. 11 (*ibid.*). As to the value of a "tied" house, see *Inland Revenue* v. *Edinburgh Corporation* (1903), 5 F. (Ct. of Sess.) 875; and see p. 189, *post*.

(*m*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 11. The expressions "full annual value" and "such value" in Sched. B, rr. 8, 9 and 10 (*ibid.*), also mean rental value. These rules are, however, in practice never applicable, because at the present day the poor rate is not made upon the full annual value, but upon the net annual value, *i.e.*, the rental value after making the statutory deductions for cost of repairs, insurance, and other expenses. The effective rule for valuation is therefore *ibid.*, r. 11. See *Walker* v. *Brisley*, *Grinter* v. *Fleming*, *supra*.

(*n*) *Walker* v. *Brisley*, *Grinter* v. *Fleming*, *supra*.

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"Tied" rent.

Where the house is in fact let at a rack rent, such rent is the value for the purpose of the duty (*o*), but a "tied" rent of a licensed house, in the ordinary case where the tenant is under covenant to buy his excisable liquors from the landlord, does not constitute the rent of the house for the purpose of assessment to the inhabited house duty, if, in fact, such covenant be an onerous covenant (*p*).

Rent for house and chattels.

Where a single sum is payable as rack rent for the demise of a house, together with chattels and furniture, the rent should be apportioned and the valuation should be based upon so much thereof as the Commissioners find to be payable in respect of the house irrespective of the chattels (*q*).

SUB-SECT. 3.—*Procedure Subsequent to Assessment.*

Surveyor may make supplementary assessments and rectify omissions and undercharges.

433. The surveyor of taxes, on behalf of the Crown, has the right to make supplementary and additional assessments in order to rectify any omission or undercharge in an original assessment (*r*).

Any party charged with the duty has a right to appeal to the General Commissioners against any original, supplementary or additional assessment (*r*).

Party charged may appeal to General Commissioners;

There is a right of appeal from the General Commissioners on any point of law to the High Court of Justice by way of case stated (*r*).

and to High Court.

The remedy of the Crown for non-payment of the duty is by information or by distress (*r*).

Remedies for non-payment.

SECT. 4.—*Exemptions and Abatements.*

SUB-SECT. 1.—*Unoccupied Houses and Houses in Charge of a Caretaker (s).*

Houses which are unoccupied or occupied only by a caretaker during an entire quarter are not chargeable.

434. It will have been seen (*a*) that a house is "occupied," and therefore chargeable to the duty if it is furnished as a dwelling-house, notwithstanding that no one has in fact slept or resided in it during the year of assessment. But a house which is neither occupied nor furnished for occupation, and remains so for an entire quarter, is, under the conditions mentioned below, not chargeable; and a house or tenement from which the owner or occupier has *bonâ fide* removed and which is wholly unfurnished at the time of making the assessment is to be deemed and taken to be unoccupied and

(*o*) *Campbells* v. *Inland Revenue Commissioners* (1880), 17 Sc. L. R. 23; and see *Turner* v. *Carlton*, [1909] 1 K. B. 932.

(*p*) *Walker* v. *Brisley*, *Grinter* v. *Fleming*, [1900] 2 Q. B. 735.

(*q*) *Campbells* v. *Inland Revenue Commissioners*, *supra*.

(*r*) In these matters the procedure in respect of Inhabited House Duty is practically identical with that in respect of Income Tax, and is fully dealt with under that heading; see title INCOME TAX, Vol. XVI., pp. 679 *et seq.* See also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 376.

(*s*) As the Inhabited House Duty is imposed only upon dwelling-houses which are inhabited, it is not, of course, accurate to speak of the immunity of houses which are wholly unoccupied as an exemption. But, on the other hand, the immunity of a house which is occupied by a caretaker is properly an exemption, and is so treated in the House Tax Act, 1808 (48 Geo. 3, c. 53), Sched. B. It is convenient, therefore, to treat the two cases together.

(*a*) See note (*e*), p. 182, *ante*.

SECT. 4. Exemptions and Abatements.

not liable to assessment, although left to the charge of a person or servant who has been placed and dwells therein solely for the purpose of airing the same and preventing depredation or injury to the premises (*b*).

Immunity upon similar lines is granted by way of exemption in the case of houses the keeping of which is left to the charge of a person who does not pay rates to the Church or poor, and who resides therein for the purpose of taking care thereof (*c*).

Provisions giving effect to above immunity.

435. Various provisions are made for the purpose of preventing the duty from attaching to a house which remains unoccupied in the above sense for any period not less than a full quarter of a year and for securing payment of the duty when it becomes occupied (*d*). They may be summarised as follows :—

Incoming occupier must give notice.

A person who comes into occupation of such house must give notice thereof to the assessor. If he neglects to give such notice he is liable to a penalty of £5. On giving such notice he is to be charged with the duty only from the end of the quarter preceding the commencement of his occupation; but in default of such notice he is to be charged for the whole year (*e*).

Houses becoming unoccupied after assessment are to be charged for the whole year unless notice in writing of the fact is given to the assessor (*f*).

Change of occupation.

When a change in the occupation of a house takes place after the assessment is made, the duties for the year are payable by the successive occupiers or owners according to their periods of possession, and will be discharged for such portion of the year, if any, during which the house is unoccupied (*g*).

Occupier quitting during a quarter.

When the tenant or occupier quits after an assessment has been made, the duty for the quarter or quarters of the year during which the house continued wholly empty and unoccupied is to be remitted (*h*).

New house.

A house not built or completed when the assessment is made is, on becoming occupied, to be charged only from the end of the quarter preceding the date of occupation, upon notice being given. In default of notice, or when the house becomes occupied within the first quarter of the year, the duty is payable for the entire year (*i*).

(*b*) House Tax Act, 1825 (6 Geo. 4, c. 7), s. 3. The immunity from duty will be lost if the caretaker's functions are not confined to the purposes mentioned (*London Library* v. *Carter* (1890), 38 W. R. 478). As to meaning of "person or servant," the cases cited in note (*v*) on p. 193, *post*, may be consulted.

(*c*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, Exemptions, Case 5. As to caretakers of houses or tenements used for business or professional purposes, see p. 195, *post*.

(*d*) Unoccupied houses as well as those which are occupied are to be entered on the assessment lists, and assessed by the Commissioners (see p. 187, *ante*), and according to the statutory provisions, exemption from the duty can be obtained only upon application to the Commissioners. But in practice where the conditions of exemption apply no such application is required.

(*e*) House Tax Act, 1803 (43 Geo. 3, c. 161), s. 15. See *Re Colyton* (1820), 8 Price, 117.

(*f*) House Tax Act, 1803 (43 Geo. 3, c. 161), s. 15.

(*g*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. A, r. 5.

(*h*) *Ibid.*; House Tax Act, 1825 (6 Geo. 4, c. 7), s. 2.

(*i*) *Ibid.*, s. 2.

SUB-SECT. 2.—*Crown Property.*

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436. Any house belonging to His Majesty or any of the Royal Family, except the private estates of the Sovereign, and any public office for which the duties payable before 1808 had been paid by the Crown or out of the public revenue, is exempt from the duty, upon notice being given to the assessor (*j*).

Crown property.

The private estates of the Sovereign are subject to the duty as well as to other taxes, and they are paid out of the privy purse (*k*).

Private estates of Sovereign.

SUB-SECT. 3.—*Charitable Institutions.*

437. Any hospital, charity school, or house provided for the reception or relief of poor persons, is exempt from the duty upon notice being given to the assessor (*l*).

Charitable institutions.

SUB-SECT. 4.—*Premises used for Business Purposes.*

438. The statutory rule which provides that shops and warehouses attached to or communicating with a dwelling-house shall be valued therewith for the purposes of the inhabited house duty (*m*) was subject to two exemptions:—

Exemptions of certain warehouses under the House Tax Act, 1808.

(1) An exemption is made in favour of warehouses and buildings upon or near adjoining wharfs, if occupied by wharfingers having dwelling-houses upon the wharfs for the residence of themselves and their servants employed thereon (*n*).

(2) Also in favour of such warehouses as are distinct and separate buildings and not part of the dwelling-house or of a shop attached thereto, but employed solely for the purpose of lodging goods, wares, and merchandise, or for carrying on some manufacture (notwithstanding that the same may adjoin to or have communication with the dwelling-house or shop (*o*)).

The latter exemption does not extend to the shops themselves, or to show-rooms, however extensive, where goods are exposed for inspection and purchase by retail customers (*p*).

Exemption does not extend to shops.

A further exemption was granted (*q*) in the case of tenements

Further exemption under House Tax Acts, 1817 and 1832.

(*j*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, Exemptions, Case 1; House Tax Act, 1803 (43 Geo. 3, c. 161), s. 17. As to Crown privilege in relation to taxation, see *Coomber* v. *Berks Justices* (1883), 9 App. Cas. 61 (a case decided upon the Income Tax Acts). See also titles CONSTITUTIONAL LAW, Vol. VII., pp. 118 *et seq.*; INCOME TAX, Vol. XVI., pp. 631 *et seq.*

(*k*) See Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37); Crown Private Estates Act, 1873 (36 & 37 Vict. c. 61); and title CONSTITUTIONAL LAW, Vol. VII., p. 277.

(*l*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, Case 4; House Tax Act, 1803 (43 Geo. 3, c. 161), s. 17. The construction and scope of this exemption is discussed under title CHARITIES, Vol. IV., pp. 213, 214.

(*m*) House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 3; and see p. 184, *ante*.

(*n*) *Ibid.*

(*o*) *Ibid.*

(*p*) *Re British and Foreign Bible Society* (1875), 1 Tax Cas. 13; *Maple & Co.* v. *Wilson* (1901), 85 L. T. 229.

(*q*) House Tax Act, 1817 (57 Geo. 3, c. 25), ss. 1, 2, as amended by Revenue Act, 1867 (30 & 31 Vict. c. 90), s. 25; and by Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91), and Statute Law Revision Act, 1890 (53 & 54 Vict. c. 33); House Tax Act, 1832 (2 & 3 Will. 4, c. 113), s. 3.

SECT. 4. Exemptions and Abatements.

or buildings, or parts of tenements or buildings, which, having been previously occupied as dwelling-houses by persons who have since gone to reside in taxable dwelling-houses elsewhere, are used wholly as houses for trade (*r*) or as warehouses for lodging goods, or as shops or counting-houses, no person dwelling therein except in the daytime.

General exemptions in favour of houses occupied for trade or professional purposes.

The foregoing exemptions in relief of trade have been extended and to a considerable extent superseded by a more recent enactment (*s*), which in two sub-sections extends exemptions to houses occupied for any purpose of trade or business, or of any profession or calling, and, under certain conditions, to single tenements in a house, if used for any of such purposes, or if unoccupied. The provisions are as follows :—

Customs and Inland Revenue Act, 1878, s. 13, as amended.

Sub-sect. 1. Where any house, being one property, is divided into, and let in, different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house is at liberty to give notice in writing at any time during the year of assessment, to the surveyor of taxes for the parish or place in which the house is situate, stating the facts; and after the receipt of such notice by the surveyor, the Commissioners acting in the execution of the Acts relating to the inhabited house duties are, upon proof of the facts to their satisfaction, to grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value at which the house should, in their opinion, have been assessed, if it had been a house comprising only the tenements other than those which are occupied as above mentioned or which are unoccupied (*t*).

Sub-sect. 2. Every house or tenement which is occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit is to be exempted from the duty by the said Commissioners

(*r*) As to the meaning of "trade" used in a like connection in the Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 11 (repealed), see *Rusby* v. *Newson* (1875), L. R. 10 Exch. 322 ; *Keene* v. *Dashwood* (1877), 36 L. T. 215 ; *Bank of India* v. *Wilson* (1877), 3 Ex. D. 108 ; *Keen* v. *Fuller and Horsey* (1877), 1 Tax Cas. 194 ; *Scottish Widows' Fund* v. *Inland Revenue (Solicitor)* (1875), 2 R. (Ct. of Sess.) 394 ; *Edinburgh Life Assurance Co.* v. *Inland Revenue (Solicitor)* (1875), 2 R. (Ct. of Sess.) 394 ; and also *Re Scottish National Insurance Co.* (1875), 1 Tax Cas. 11 ; *Re Caledonian Fire and Life Insurance Co.* (1875), 1 Tax Cas. 12.

(*s*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13 (repealing the Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 11), which seems to have had the double object of extending the exemption hitherto confined to premises occupied for the purpose of any trade, and at the same time of remedying the grievance of owners of flats consequent on the decision in *A.-G.* v. *Mutual Tontine Westminster Chambers Association* (1876), 1 Ex. D. 469, C. A., so far as that decision affected flats containing tenements any of which were occupied solely for the purposes of trade. See *Grant* v. *Langston*, [1900] A. C. 383, *per* Lord MACNAGHTEN, at p. 395.

(*t*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13 (1).

upon proof of the facts to their satisfaction, and this exemption is to take effect although a servant or other person may dwell in such house or tenement for the protection thereof (*u*).

The term "servant" here means only a menial or domestic servant employed by the occupiers; and the expression "other person" means any person of a similar grade or description not otherwise employed by the occupier and engaged by him to dwell in the house or tenement solely for its protection (*v*).

Points decided on the construction of the last-mentioned enactment.

439. These provisions have given rise to much litigation, and it cannot be said that the true construction is yet on all points clear, but it is conceived that the following propositions represent the result of the decisions:—

1. In order to bring the case within *sub-sect.* 1, the whole or, at any rate, substantially the whole house must be divided into separate tenements, and unless this is the case neither the landlord nor the occupier of any tenement therein can claim the exemption (*a*).
2. The division contemplated is a structural division, or at any rate a physical division of a permanent nature (*b*).
3. Further, in order to bring the case within *sub-sect.* 1, the entire house or, at any rate, substantially the whole must, in addition, be either actually let in separate tenements at the time, or, at any rate, be habitually so let. The fact of the landlord reserving any substantial part for his own use is fatal to

(*u*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13 (2).

(*v*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 24. Before the passing of this amending provision, the expression "servant or other person" in the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13 (2), was the subject of the following decisions which are now no longer directly in point:—*Yewens* v. *Noakes* (1880), 6 Q. B. D. 530, C. A.; *City Bank* v. *Last* (1881), 47 L. T. 254; *Wootten* v. *Rolfe* (1881), 47 L. T. 252; *Re Ainslie* (1881), 1 Tax Cas. 342; *Rolfe* v. *Hyde* (1881), 6 Q. B. D. 673; *Cowan and Strachan* v. *Inland Revenue, Scottish Widows' Fund* v. *Inland Revenue* (1880), 7 R. (Ct. of Sess.) 491.

(*a*) *London and Westminster Bank* v. *Smith* (1902), 87 L. T. 244, 246, H. L.; *Yorkshire Insurance Co.* v. *Clayton* (1881), 8 Q. B. D. 421, C. A.; *Chapman* v. *Royal Bank of Scotland* (1881), 7 Q. B. D. 136; *Russell* v. *Coutts* (1881), 9 R. (Ct. of Sess.) 261; *Knight* v. *Manley* (1905), 92 L. T. 506; *Walsingham (Lord)* v. *Styles* (1894), 3 Tax Cas. 247; *Corke* v. *Brims* (1883), 10 R. (Ct. of Sess.) 1128; *Nisbet* v. *M'Innes, Mackenzie and Lockhead*, (1884), 11 R. (Ct. of Sess.) 1095; *Clerk* v. *British Linen Co.* (1885), 12 R. (Ct. of Sess.) 1133; *Smiles* v. *Crooke* (1886), 13 R. (Ct. of Sess.) 730; *Allan* v. *Miller* (1889), 16 R. (Ct. of Sess.) 557; *Grant* v. *Langston*, [1900] A. C. 383; *Union Bank of Scotland* v. *Inland Revenue* (1901), 3 F. (Ct. of Sess.) 771; *Murdochs* v. *Inland Revenue* (1904), 7 F. (Ct. of Sess.) 111; *Nicholls* v. *Malim*, [1906] 1 K. B. 272.

(*b*) *Chapman* v. *Royal Bank of Scotland, supra*; *Russell* v. *Coutts, supra*; *Corke* v. *Brims, supra*; *Hoddinot* v. *Home and Colonial Stores*, [1896] 1 Q. B. 169. These cases seem to show that original structural division between the tenements is not necessary; that the screwing up and barring of the door of communication is sufficient; that possibly heavy doors constantly kept locked and bolted might suffice (*per* Lord BRAMPTON in *London and Westminster Bank* v. *Smith*, *supra*, at p. 246); but that a mere contractual division, or the shutting, or even locking of an ordinary door between two rooms would not satisfy the section. See, however, the observations of PHILLIMORE, J., in *Knight* v. *Manley*, *supra*, at p. 509.

SECT. 4. Exemptions and Abatements.

the claim, whether on the part of the landlord or of any occupier (*c*).

4. Where the conditions as regards division and letting are not fulfilled, the landlord or owner is chargeable with the duty for the entire house, including the parts occupied by his tenants (*d*). Where they are fulfilled, he is chargeable only in respect of such parts of the house as the exemption does not apply to (*e*).
5. The two *sub-sections* are entirely separate and distinct, and an occupier is entitled to relief if his case comes within either of them (*f*).
6. Where two tenements under one roof are structurally separate from top to bottom, with separate entrances from the street, each tenement may constitute a house or tenement within *sub-sect.* 2, and if either tenement is occupied solely for the purposes of any trade, business, profession or calling, exemption from the duty may be claimed in respect of such tenement; and this is the case though one or both of such tenements are in the occupation of the owner (*g*).
7. It seems that a self-contained flat to which the occupier has access by a staircase in common with the tenants of the other flats, the landlord having the key and the control of the staircase, is not a house or tenement within *sub-sect.* 2, and that an occupier using such flat solely for the purposes of his trade, business, profession or calling, is not entitled to exemption from the duty unless he can bring his case within *sub-sect.* 1 (*h*).

(*c*) *London and Westminster Bank* v. *Smith* (1902), 87 L. T. 244, H. L.; *Chapman* v. *Royal Bank of Scotland* (1881), 7 Q. B. D. 136, and the other cases cited in note (*a*) on p. 193, *ante*; *Hoddinot* v. *Home and Colonial Stores*, [1896] 1 Q. B. 169. In the Scottish courts it has been held that where the whole house is let to one person, and the lessee sublets one part, which forms a self-contained tenement, retaining the rest himself for business purposes, the business premises are exempt (*Smiles* v. *Crooke* (1886), 13 R. (Ct. of Sess.) 730; *Allan* v. *Miller* (1889), 16 R. (Ct. of Sess.) 1133). But these cases seem to be inconsistent with *Hoddinot* v. *Home and Colonial Stores*, *supra*, and cannot, it is submitted, be relied upon. If they are rightly decided it would appear to follow that the lessee of a house, for however long a term, is in a more favourable position as regards exemption than the freeholder, and a sub-lessee of a tenement in a more favourable position than an original lessee.

(*d*) *London and Westminster Bank* v. *Smith*, *supra*. The case then falls within the House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 6; see pp. 184, 185, *ante*.

(*e*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13 (1); see p. 192, *ante*.

(*f*) *Grant* v. *Langston*, [1900] A. C. 383.

(*g*) *Grant* v. *Langston*, *supra*, where there was a building of two stories under one roof, and the owner occupied the ground floor for his business as a licensed victualler, and the upper storey as his dwelling-house, the two tenements being separate throughout without inter-communication and having separate entrances to the street, and it was held that the owner was entitled to exemption in respect of his business premises under the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13 (2); see p. 192, *ante*. And see *Chapman* v. *Royal Bank of Scotland*, *supra*.

(*h*) *London and Westminster Bank* v. *Smith*, *supra*; *Yorkshire Insurance Co.* v. *Clayton* (1881), 8 Q. B. D. 421, C. A. The common staircase seems to be the circumstance which differentiates flats such as those which were in question in the case of *Walsingham* (*Lord*) v. *Styles* (1894), 3 Tax Cas. 247, from the

8. If more than one person thus dwells in the house in the capacity of caretaker, the benefit of the exemption is taken away (*i*); and whether the caretaker be a servant or "other person," he must dwell in the house for its protection, and if he dwell there for other purposes also, the benefit of the exemption is taken away (*k*).

SUB-SECT. 5.—*Houses used for Providing Separate Dwellings.*

440. A house which, so far as it is used as a dwelling-house, is used for the sole purpose of providing separate dwellings, is to be dealt with as follows (*l*):—

Exemption and abatement of duty in the case of houses providing separate dwellings.

(1) The value of any dwelling therein of an annual value of below £20 is to be excluded from valuation.

(2) The rate of duty in respect of any dwelling therein of an annual value of £20, but not exceeding £40, is to be reduced to 3*d*.

(3) The rate of duty in respect of any dwelling therein of an annual value exceeding £40, but not exceeding £60, is to be reduced to 6*d*.

Conditions of exemption and abatement.

The exemption and the abatement specified in (1) and (2) respectively are not to take effect (*m*), except upon production of a certificate of the medical officer of health for the district (*n*), to the effect that the house is so constructed as to afford suitable accommodation for each of the families or persons inhabiting it, and that due provision is made for their requirements.

Medical officer to give certificate.

The medical officer is, upon request by the person who would be liable to pay the house duty, to examine the house, for the purpose of ascertaining whether such certificate can properly be given, and, if so, to certify accordingly (*o*).

tenements in *Grant* v. *Langston*, [1900] A. C. 383 (see *London and Westminster Bank* v. *Smith* (1902), 87 L. T. 244, H. L., *per* Lord BRAMPTON, at p. 246). The proposition in the text cannot, however, be regarded as indisputable having regard to Lord DAVEY'S expression of opinion in the case of *Grant* v. *Langston*, *supra*, at p. 397, that the word "tenement" must have the same meaning in the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13 (2), as it has in s. 13 (1) (*ibid.*). It is to be remarked, however, that if this be so, the condition as regards letting in s. 13 (1) (*ibid.*) would appear to be inoperative, since an occupier for business purposes of a divided tenement, who is excluded from claiming exemption under s. 13 (1) (*ibid.*) by reason of the whole house not being let, would be exempt under s. 13 (2) (*ibid.*).

(*i*) *Weguelin* v. *Wayall* (1885), 14 Q. B. D. 838. But see *Inland Revenue* v. *Standard Life Assurance Co.* (1894), 21 R. (Ct. of Sess.) 820, where this decision is doubted by Lord ADAM.

(*k*) *Inland Revenue* v. *Standard Life Assurance Co.*, *supra*; *Lambton* v. *Kerr* [1895] 2 Q. B. 233; *London Library* v. *Carter* (1890), 38 W. R. 478; *Smiles* v. *Merchant Co. of Edinburgh* (1889), 2 Tax Cas. 533; *London and Westminster Bank* v. *Smith*, *supra*, and for cases previous to the amending Act, Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), see note (*v*), p. 193, *ante*.

(*l*) Revenue Act, 1903 (3 Edw. 7, c. 46), ss. 11, 17, and Sched. For the purpose of this Act, the otherwise repealed Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 26 (2), remains in force. See also the Customs and Inland Revenue Act, 1891 (54 & 55 Vict. c. 25), s. 4 (2).

(*m*) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 11 (2).

(*n*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*o*) Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 26 (2).

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If the authority is of opinion that the duties which would devolve on the medical officer could not be performed by him without interference with the due performance of his ordinary duties, it may appoint some other legally qualified medical practitioner, having the same qualification, to act in his place, whose certificate shall have the same effect (*p*).

Dwellings need not be structurally divided from one another.

441. In order to entitle a particular dwelling to exemption, or abatement, it would seem that it is not necessary that there should be a structural division of each set of rooms from the others. A set of rooms consisting of a bedroom, sitting-room and kitchen opening upon a landing, the lodger having the use, in common with other lodgers, of the front entrance and hall, is entitled to the exemption or abatement (*q*). Cubicles, however, provided for sleeping only, the inmates having access in common to adjoining dining-rooms, reading-rooms and kitchens, are not separate dwellings entitled to exemption or abatement (*r*).

Tenements must be used for dwelling exclusively.

If any one of the tenements is used as a shop as well as a dwelling-house, the exemption or abatement is excluded as regards the whole house (*s*).

(*p*) Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 26 (2).
(*q*) *Seaman* v. *Lee* (1899), 68 L. J. (Q. B.) 593.
(*r*) *London County Council* v. *Cook*, [1906] 1 K. B. 278.
(*s*) *Hillman* v. *Ankerson* (1906), 95 L. T. 452.

INHERITANCE.

See COPYHOLDS; DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; REAL PROPERTY AND CHATTELS REAL.

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INJUNCTION.

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Architects - - - ,, BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS.
Boundaries - - - ,, BOUNDARIES, FENCES, AND PARTY WALLS.
Commons - - - ,, COMMONS AND RIGHTS OF COMMON.
Contractual Rights - - ,, CONTRACT; SPECIFIC PERFORMANCE.
Copyright - - - ,, COPYRIGHT AND LITERARY PROPERTY.
Cremation - - - ,, BURIAL AND CREMATION.
Damages - - - ,, DAMAGES.
Designs - - - - ,, TRADE MARKS, TRADE NAMES, AND DESIGNS.
Engineers - - - ,, BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS.

For Fences	*See title*	BOUNDARIES, FENCES, AND PARTY WALLS.
Inventions	,,	PATENTS.
Libellous Statements	,,	LIBEL AND SLANDER.
Mortgagors and Mortgagees	,,	MORTGAGE.
Nuisance	,,	NUISANCE.
Partners	,,	PARTNERSHIP.
Party Walls	,,	BOUNDARIES, FENCES, AND PARTY WALLS.
Patent Rights	,,	PATENTS.
Property in Unpublished Writings	,,	COPYRIGHT AND LITERARY PROPERTY.
Restrictive Injunction	,,	SPECIFIC PERFORMANCE.
Right of Way	,,	EASEMENTS AND PROFITS À PRENDRE.
Trade Marks	,,	TRADE MARKS, TRADE NAMES, AND DESIGNS.
Waste	,,	REAL PROPERTY AND CHATTELS REAL.

Part I.—Nature of Remedy and Jurisdiction.

SECT. 1.—*Restrictive and Mandatory Injunctions.*

442. An injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing. In the former case it is called a restrictive injunction, and in the latter a mandatory injunction (*a*). Definition of injunction.

Formerly the Court of Chancery would not direct the performance of a positive act, but by restraining a defendant from allowing things to remain as they were, as, for example, from allowing buildings to remain on land, indirectly accomplished the same result. An order so framed was called a mandatory order; but now all mandatory injunctions are in the direct mandatory form, and not in the indirect form hitherto used (*b*). There is now no Jurisdiction to grant mandatory injunctions.

(*a*) As to the nature and extent of the equitable remedy by way of injunction, see title EQUITY, Vol. XIII., pp. 46 *et seq.* An injunction was formerly enforced by means of a writ of injunction, but writs of injunction have now been abolished and an injunction is by judgment or order, but any such judgment or order has the same effect as a writ of injunction previously had (R. S. C., Ord. 50, r. 11).

(*b*) *Jackson* v. *Normanby Brick Co.*, [1899] 1 Ch. 438, C. A.; and see *Guinness* v. *Fitzsimons* (1884), 13 L. R. Ir. 71 (where a mandatory injunction to an evicted tenant to remove timber was granted in the direct form); *Bidwell* v. *Holdon* (1890), 63 L. T. 104 (where NORTH, J., made the order in the direct form in order that any danger of misapprehension might be avoided on the part of the defendant, who was in a humble position in life); see also *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 708, C. A. If a mandatory injunction in the negative form formerly in use is obtained, it can be enforced by obtaining a supplemental order fixing a time for compliance, and then moving for an attachment or

SECT. 1. Restrictive and Mandatory Injunctions.

question as to the jurisdiction of the court to grant mandatory injunctions, and where the court is satisfied that a substantial wrong has been done and there has been no delay or acquiescence, it will, in a proper case, not hesitate to grant a mandatory injunction (*c*).

SECT. 2.—*Perpetual and Interlocutory Injunctions.*

Perpetual injunction.

443. A perpetual injunction is based on a final determination of the rights of the parties, and is intended permanently to prevent infringement of those rights and obviate the necessity of bringing action after action in respect of every such infringement (*d*).

Does not run with land.

444. An injunction, being personal, does not run with the land (*e*).

Interlocutory injunction.

445. The object of an interlocutory or interim injunction is to preserve matters *in statu quo*, until the case can be tried (*f*). Such an injunction, therefore, only continues in force until the hearing of the cause, or until further order, when, as is usually the case, the order is so framed. It cannot be considered in argument as affecting the ultimate decision of a cause (*g*). In granting an interlocutory injunction the court acts in aid of the legal right, on the principle of preserving property until a legal decision can be had on the rights of the parties (*h*). It does not assume finally to dispose of the legal right (*i*), and will only impose such restraint as may suffice to stop the mischief complained of, or, where the object is to stay further injury, to keep things as they are at the moment (*k*). Such an injunction is in effect a substitute for the

committal (see p. 291, *post*), upon proof of personal service of both orders (*Mansell* v. *Jones*, [1905] W. N. 168, C. A.; *Smith* v. *Smith* (1875), L. R. 20 Eq. 500; *Hermann Loog* v. *Bean* (1884), 26 Ch. D. 306, 314, C. A.). It has been said that the power of granting mandatory injunctions must be exercised with the greatest possible care (*Isenberg* v. *East India House Estate Co.* (1863), 3 De G. J. & Sm. 263, *per* Lord WESTBURY, L.C., at p. 272), but every injunction, whether restrictive or mandatory, ought to be granted with care and caution, and no more care or caution is required in the case of a mandatory injunction than a restrictive injunction (*Smith* v. *Smith*, *supra*, *per* JESSEL, M.R., at p. 504; see *Lawrence* v. *Horton* (1890), 59 L. J. (CH.) 440).

(*c*) *Smith* v. *Smith*, *supra*; *Shiel* v. *Godfrey & Co.*, [1893] W. N. 115. As to the protection of contractual rights by a restrictive or mandatory injunction, see p. 235, *post*.

(*d*) See *Imperial Gas Light and Coke Co.* (*Directors*) v. *Broadbent* (1859), 7 H. L. Cas. 600.

(*e*) *A.-G.* v. *Birmingham, Tame, and Rea Drainage Board* (1881), 17 Ch. D. 685, C. A.; *A.-G.* v. *Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A.

(*f*) *Plimpton* v. *Spiller* (1876), 4 Ch. D. 286, 289, C. A.; *Black Point Syndicate, Ltd.* v. *Eastern Concessions, Ltd.* (1898), 79 L. T. 658, 662. As to interim orders, see p. 277, *post*.

(*g*) *Drew* v. *Harman* (1818), 5 Price, 319, 322.

(*h*) *Saunders* v. *Smith* (1838), 3 My. & Cr. 711; *Hilton* v. *Granville* (*Earl*) (1841), Cr. & Ph. 283, 292.

(*i*) *Harman* v. *Jones* (1841), Cr. & Ph. 299; *Preston* v. *Luck* (1884), 27 Ch. D. 497, 506, C. A.

(*k*) *Blakemore* v. *Glamorganshire Canal Navigation* (1832), 1 My. & K. 154, 185; *Harman* v. *Jones*, *supra*.

damages which might be assessed for the period between the issuing of the writ and the trial (*l*); and so a claim for such an injunction may be joined with a claim for the possession of land, though probably a claim for a perpetual injunction could not be so joined without leave (*m*).

SECT. 3.—*Ancillary Accounts.*

Accounts.

446. Where a man establishes his right to a perpetual injunction, the court will also, where the case so requires, give him an account, that his remedy may be complete (*n*); but before the Judicature Acts, if for any reason the injunction was refused, there could be no account, for there was nothing to which the jurisdiction of equity could attach, the right to an account being dependent on the right to the injunction (*o*). The right to an account may be lost by delay (*a*), even though an injunction is granted (*b*). The account is limited to the actual profits made by the wrongdoer, and cannot be extended so as to cover the damage sustained by reason of merely tortious acts unaccompanied by profit (*c*). The account will be limited to a period of six years before the date of the commencement of the action (*d*).

Where doubt exists.

447. Where a doubt exists as to the legal right, and especially when an injunction might be a great hardship on the defendant, an interlocutory injunction will be refused, on the defendant undertaking to keep an account (*e*).

(*l*) *Read* v. *Wotton*, [1893] 2 Ch. 171, 174.

(*m*) *Ibid.*; R. S. C., Ord. 18, r. 2; but see *Kendrick* v. *Roberts* (1882), 46 L. T. 59

(*n*) *Baily* v. *Taylor* (1829), 1 Russ. & M. 73; *Smith* v. *London and South Western Rail. Co.* (1854), Kay, 408; *Price's Patent Candle Co.* v. *Bauwen's Patent Candle Co.* (1858), 4 K. & J. 727.

(*o*) *Ibid.* In *Price's Patent Candle Co.* v. *Bauwen's Patent Candle Co.*, *supra*, the rule was held equally applicable, although the ground for refusing the injunction in that case was that there was nothing left upon which it could operate, the stock of the defendants, in respect of which the injunction was sought, having been sold before the hearing. In the case of mines, however, an account may be had even though no injunction would lie (*Parrott* v. *Palmer* (1834), 3 My. & K. 632, 642). Damages cannot be given as well as an account, see p. 215, *post*.

(*a*) *Parrott* v. *Palmer*, *supra*.

(*b*) *Harrison* v. *Taylor* (1865), 11 Jur. (N. S.) 408.

(*c*) *Colburn* v. *Simms* (1843), 2 Hare, 543, 560; *Powell* v. *Aiken* (1858), 4 K. & J. 343, 351; *Muddock* v. *Blackwood*, [1898] 1 Ch. 58.

(*d*) *Crossley* v. *Derby Gas Light Co.* (1834), 4 L. J. (CH.) 25; *Dean* v. *Thwaite* (1855), 21 Beav. 621; but the account would not be so limited in a case of fraud in which steps were taken to secure secrecy and prevent discovery (*Dean* v. *Thwaite*, *supra*; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, P. C.). As to the difficulties which sometimes arise in working out a decree for an account, in consequence of which an arrangement or compromise is often come to, see *Crosley* v. *Derby Gas-Light Co.* (1838), 3 My. & Cr. 428.

(*e*) *Bramwell* v. *Halcomb* (1836), 3 My. & Cr. 737, 739; *Saunders* v. *Smith* (1838), 3 My. & Cr. 711, 738; *Spottiswoode* v. *Clarke* (1846), 2 Ph. 154 (cases of copyright); *Morgan* v. *Seaward* (1835), 1 Web. Pat. Cas. 167; *Neilson* v. *Thompson and Forman* (1840), 1 Web. Pat. Cas. 275, 286; *Clarke* v. *Nichols* (1895), 12 R. P. C. 310; *Holophane, Ltd., O'Clery and Davis* v. *Berend (O.) & Co., Ltd.* (1897), 15 R. P. C. 18. The plaintiff is entitled to a formal undertaking to account (*Thomson* v. *Hughes* (1890), 7 R. P. C. 71, 76).

SECT. 3. Ancillary Accounts.

448. An account may also be ordered to be kept when an interlocutory injunction is refused (*f*), or when an injunction is stayed pending an appeal (*g*).

Where interlocutory injunction refused.

SECT. 4.—*Jurisdiction.*

Original jurisdiction.

449. The power to grant an injunction does not depend upon the existence of property. Independently of any question as to the right at law, the Court of Chancery had an original and independent jurisdiction to prevent what it considered an injury, whether arising from a violation of an unquestionable right or from a breach of contract or confidence (*h*).

Concurrent jurisdiction.

450. The jurisdiction to grant relief by way of injunction was formerly only exercisable by the Court of Chancery (*i*), but courts of common law were empowered to grant injunctions in certain cases (*k*), and the jurisdiction of the Court of Chancery and the common law courts having been transferred (*l*) to the High Court of Justice, every branch of the court has now, therefore, jurisdiction to grant injunctions in all cases in which courts of equity or common law could formerly grant such relief (*m*).

Judicature Act, 1873.

451. It has also been specially provided (*n*) that an injunction by interlocutory order (*o*) may be granted in all cases in which it appears to the court to be just or convenient that such order shall be made; and that any such order may be made unconditionally or upon such terms and conditions as the court shall think just.

Effect of provision on principles upon which injunction granted.

This provision did not alter the principles upon which the court acted in granting injunctions (*p*), but was intended only to do

(*f*) See p. 222, *post*.

(*g*) *Kaye* v. *Chubb & Sons* (1886), 4 R. P. C. 23.

(*h*) *Albert* (*Prince*) v. *Strange* (1849), 1 Mac. & G. 25; *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345, 354; and see *Goodeson* v. *Gallatin* (1771), 2 Dick. 455, as to the origin and extent of the jurisdiction; see also p. 255, *post*.

(*i*) As to the jurisdiction generally and the cases in which the courts exercised jurisdiction in respect of injunctions before 1875, see title EQUITY, Vol. XIII., pp. 46—65.

(*k*) The courts of common law could grant injunctions in the case of patents under the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), repealed by the Patents, Designs, and Trade MARKS Act, 1883 (46 & 47 Vict. c. 57). See also title EQUITY, Vol. XIII., p. 51.

(*l*) By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.

(*m*) *Beddow* v. *Beddow* (1878), 9 Ch. D. 89, 93. This jurisdiction is practically unlimited, except for the fact that it can only be exercised where it is right or just to do so; but what is right or just must be decided not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles (*ibid.*).

(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8). As to the latter part of this provision, dealing with applications for injunctions before, at, or after the hearing, in the case of any threatened or apprehended waste or trespass, see pp. 232, 233, *post*.

(*o*) These words are not confined in their meaning to an order made between writ and final judgment, but mean an order other than a final judgment in an action, whether made before judgment or after (*Smith* v. *Cowell* (1880), 6 Q. B. D. 75, C. A.).

(*p*) *Fletcher* v. *Rodgers* (1878), 27 W. R. 97, C. A.; *Day* v. *Brownrigg* (1878), 10 Ch. D. 294, 307, C. A.; *Gaskin* v. *Balls* (1879), 13 Ch. D. 324, C. A.

away with certain technical difficulties with respect to injunctions (*q*). It did not enlarge the jurisdiction of the court so as to enable it to grant an injunction in a case in which, before the provision came into force, there was no legal right on the one side or no legal liability on the other at law or in equity (*r*). It did, however, give to the court power, when dealing with legal rights which were under its jurisdiction independently of this provision, if it should think it just or convenient, to superadd to what would have been previously the remedy, a remedy by way of injunction (*a*); and now, therefore, whenever a legal right, which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the court is enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right (*b*).

Construction of "just or convenient."

The words "just or convenient" in the above provision must be read "just as well as convenient" (*c*). They do not mean that the court can grant an injunction simply because the court thinks it convenient, but mean that the court should grant an injunction for the protection of rights or the prevention of injury according to legal principles (*d*). They confer no arbitrary nor unregulated discretion on the court, and do not authorise it to invent new modes of enforcing judgments in substitution for the ordinary modes (*e*).

Prevention of repetition or continuance of wrongful act or breach of contract.

452. It is also provided that in any cause or matter in which an injunction has been or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind relating to the same property or right, or arising out of the same contract; and

(*q*) *Fletcher* v. *Rodgers* (1878), 27 W. R. 97, C. A.

(*r*) *North London Rail. Co.* v. *Great Northern Rail. Co.* (1883), 11 Q. B. D. 30, C. A; *Kitts* v. *Moore*, [1895] 1 Q. B. 253, C. A.; and see *Dicks* v. *Brooks* (1880), 15 Ch. D. 22, *per* BACON, V.-C., at p. 25; but see *contra*, *Thomas* v. *Williams* (1880), 14 Ch. D. 864, *per* FRY, J., at p. 873. It has dealt only with the procedure and not with jurisdiction at all (*North London Rail. Co.* v. *Great Northern Rail. Co.*, *supra*, *per* BRETT, L.J., at p. 36).

(*a*) *North London Rail. Co.* v. *Great Northern Rail. Co.*, *supra*, *per* COTTON, L.J., at p. 39.

(*b*) *Cork Corporation* v. *Rooney* (1881), 7 L. R. Ir. 191, 200; *North London Rail. Co.* v. *Great Northern Rail. Co.*, *supra*; *Richardson* v. *Methley School Board*, [1893] 3 Ch. 510; *Cummins* v. *Perkins*, [1899] 1 Ch. 16, 20, C. A; and see *Hedley* v. *Bates* (1880), 13 Ch. D. 498; *Smith* v. *Cowell* (1880), 6 Q. B. D. 75, 78, C. A.; *Aslatt* v. *Southampton Corporation* (1880), 16 Ch. D. 143; *Stannard* v. *St. Giles, Camberwell, Vestry* (1882), 20 Ch. D. 190, C. A. The prerogative of the Crown to intervene in actions affecting the rights and revenue of the sovereign has not been affected by the Judicature Acts (see *A.-G.* v. *Constable* (1879), 4 Ex. D. 172). The revenue side of the King's Bench Division is the proper tribunal for these matters (*Stanley* (*Lord*) v. *Wild & Son*, [1900] 1 Q. B. 256, C. A.).

(*c*) *Day* v. *Brownrigg* (1878), 10 Ch. D. 294, C. A.; and see *Beddow* v. *Beddow* (1878), 9 Ch. D. 89, 93.

(*d*) *Beddow* v. *Beddow*, *supra*, at p. 93; *Aslatt* v. *Southampton Corporation* (1880), 16 Ch. D. 143, 148.

(*e*) *Harris* v. *Beauchamp Brothers*, [1894] 1 Q. B. 801, 808, C. A.

SECT. 4. Jurisdiction.

the court may grant the injunction either upon or without terms, as may be just (*f*).

Injunctions may be granted by county courts.

453. Injunctions, both perpetual (*g*) and interlocutory (*h*), can be granted by the county court (*i*) in cases within its jurisdiction (*k*). Where an injunction and damages are granted by the county court, an appeal lies without leave against the granting of the injunction only, as distinct from the damages (*l*).

Where a statute provides a particular remedy.

454. Where a statute provides a particular remedy for the infringement of a right thereby created (*m*) or existing at common law (*n*), the jurisdiction of the court to protect the right by injunction is not excluded unless the statute expressly or by necessary implication so provides (*o*); but where the legislature has pointed out a special tribunal, another court will not, as a general rule, restrain proceedings before it by injunction (*p*).

The court acts *in personam*.

455. In granting an injunction the court acts *in personam* (*q*), and will not suffer anyone within its reach to do what is contrary to its notions of equity, merely because the act to be done may be in point of locality beyond its jurisdiction (*r*).

(*f*) R. S. C., Ord. 50, r. 12; and as to interlocutory injunctions, see p. 217, *post*.

(*g*) *Martin* v. *Bannister* (1879), 4 Q. B. D. 491, C. A.

(*h*) *Richards* v. *Cullerne* (1881), 7 Q. B. D. 623, C. A.

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 89.

(*k*) Generally, as to the jurisdiction of the county court to grant an injunction, see title COUNTY COURTS, Vol. VIII., pp. 433, 504, 592.

(*l*) *Brune* v. *James*, [1898] 1 Q. B. 417; and see title COUNTY COURTS, Vol. VIII., p. 602.

(*m*) *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501.

(*n*) *Stevens* v. *Chown*, *Stevens* v. *Clark* [1901] 1 Ch. 894.

(*o*) See cases cited in notes (*m*), (*n*), *supra*, and *A.-G.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101; *Yorkshire Miners' Association* v. *Howden*, [1905] A. C. 256, 280; *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; *Carlton Illustrators* v. *Coleman & Co., Ltd.*, [1911] 1 K. B. 771, 782 (penalty for past breaches and injunction against future breaches). As to joining the Attorney-General, see *Devonport Corporation* v. *Tozer*, [1902] 2 Ch. 182; affirmed, [1903] 1 Ch. 759, C. A.; *A.-G.* v. *Pontypridd Waterworks Co.*, [1908] 1 Ch. 388.

(*p*) *Stannard* v. *St. Giles, Camberwell, Vestry* (1882), 20 Ch. D. 190, C. A.; *Grand Junction Waterworks Co.* v. *Hampton Urban Council*, [1898] 2 Ch. 331; *Merrick* v. *Liverpool Corporation*, [1910] 2 Ch. 449; and see p. 262, *post*. In *Hayward* v. *East London Waterworks Co.* (1884), 28 Ch. D. 138, the court declined to restrain the defendants from cutting off the water supply from the plaintiff's house, on the plaintiff refusing to give an undertaking to commence proceedings with due speed before justices for the settlement of the dispute between him and the defendants, in accordance with the provisions of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 68.

(*q*) *Hope* v. *Carnegie* (1.) (1868), L. R. 7 Eq. 254. As to restraining foreign proceedings, see pp. 263 *et seq.*, *post*.

(*r*) *Carron Iron Co.* v. *Maclaren* (1855), 5 H. L. Cas. 416. As to the grounds of the court's jurisdiction, and the effect thereof upon land abroad, see, generally, titles CONFLICT OF LAWS, Vol. VI., pp. 202 *et seq.*, 244 *et seq.*, 284, 300; EQUITY, Vol. XIII., pp. 48, 66. The court will not make a decree to give effect to contractual rights relating to immovables which the *lex rei sitæ* treats as incapable of creation (*Bank of Africa, Ltd.* v. *Cohen*, [1909] 2 Ch. 129, C. A.; and see *M'Ilwraith* v. *Smiley* (1892), 8 T. L. R. 690, C. A.; and title CONFLICT OF LAWS, Vol. VI., pp. 238, 242. As to contracts illegal by English law, see *ibid.*, p. 244; and compare *Austria* (*Emperor*) v. *Day and Kossuth* (1861), 3 De G. F. & J. 217, 242, C. A., where an injunction was granted at the

A suit instituted merely to support political power and prerogative will not be entertained, but a foreign sovereign may sue and can obtain an injunction for a wrong done to him by an English subject, unauthorised by the English Government, in respect of property belonging to him, either in his individual or corporate capacity (*s*).

The court will not interfere in political matters.

The court has no jurisdiction to enforce or give relief against the breach of an engagement entered into with a foreign Government (*t*), even against the property of such Government in this country (*u*), nor to grant an injunction against a foreign ambassador who does not submit himself to the jurisdiction of the court (*a*), nor to prevent a foreign sovereign from removing his property in this country (*b*).

No jurisdiction against foreign Government.

A man cannot be restrained from applying to a foreign sovereign for a concession nor, if the concession is granted, from using the grant made by the same authority, and the fact that the concession so granted is inconsistent with one previously granted makes no difference (*c*).

456. In a proper case an injunction will be granted to restrain a department of the British Government from doing a mere ministerial act, if it does not involve an interference with the public duty of the department (*d*).

Injunction against Government department.

On the principle that the court in granting an injunction acts *in personam*, an application to Parliament could be restrained in a proper case (*e*), but a proper case for the purpose does not often occur (*f*).

Application to Parliament may be restrained.

457. The court has no jurisdiction to prevent the commission of acts which are merely criminal or illegal, and do not affect any rights of property (*g*). If, however, the criminal or illegal act involves an injury to property, the court can interfere on the ground of injury to property (*h*).

Matters merely criminal or illegal.

suit of the Emperor of Austria to restrain the manufacture and circulation of spurious notes.

(*s*) *Austria* (*Emperor*) v. *Day and Kossuth* (1861), 3 De G. F. & J. 217, C. A.

(*t*) *Gladstone* v. *Ottoman Bank* (1863), 1 Hem. & M. 505.

(*u*) *Smith* v. *Weguelin* (1869), L. R. 8 Eq. 198; *Twycross* v. *Dreyfus* (1877), 5 Ch. D. 605, C. A.

(*a*) *Gladstone* v. *Musurus Bey* (1862), 1 Hem. & M. 495, 504.

(*b*) *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, C. A.; nor will he lose his rights by submitting to be made a defendant in an action for the purpose of obtaining his property (*ibid.*).

(*c*) *Gladstone* v. *Ottoman Bank, supra.*

(*d*) *Ellis* v. *Grey* (*Earl*) (1833), 6 Sim. 214, 223.

(*e*) *Stockton and Hartlepool Rail. Co.* v. *Leeds and Thirsk and Clarence Rail. Cos.* (1848), 2 Ph. 666; *Heathcote* v. *North Staffordshire Rail. Co.* (1850), 2 Mac. & G. 100, 109; and see *Ware* v. *Grand Junction Water Works Co.* (1831), 2 Russ. & M. 470.

(*f*) *Heathcote* v. *North Staffordshire Rail. Co., supra; Steele* v. *North Metropolitan Rail. Co.* (1867), 2 Ch. App. 237; *Re London, Chatham and Dover Railway Arrangement Act*, 1867, *Ex parte London, Chatham and Dover Rail. Co.* (1869), 20 L. T. 718, C. A.

(*g*) *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, 320, C. A.; *Austria* (*Emperor*) v. *Day and Kossuth, supra*, at pp. 250, 253.

(*h*) *Ibid.*; *Macaulay* v. *Shackell* (1827), 1 Bli. (N. S.) 96, 127, H. L.; *Springhead Spinning Co.* v. *Riley* (1868), L. R. 6 Eq. 551.

Part II.—General Conditions of Relief by Injunction.

SECT. 1. Perpetual Injunction.

SECT. 1.—*Perpetual Injunction.*

SUB-SECT. 1.—*In General.*

Perpetual injunction.

458. As a general rule, before a perpetual injunction can be granted, the party applying must establish his legal right (*i*), but as soon as he has established his legal right and shown that it has been violated, then, unless there is something special in the case, he is entitled, as of course, to a perpetual injunction to prevent the recurrence of the violation (*a*). The injunction may be granted even though no damage has been caused (*b*), and though the injury complained of has ceased after action brought, but before trial (*c*); but in the latter case the court can, in the exercise of its discretion, refuse to interfere (*d*). It is not necessary to apply in the first instance for an interlocutory injunction (*e*).

A perpetual injunction cannot, as a rule, be granted before the hearing (*f*), but where, as is often the case, on a motion for an interlocutory injunction (*g*), the parties agree that the motion shall

(*i*) *Spottiswoode* v. *Clarke* (1846), 2 Ph. 154; *Imperial Gas Light and Coke Co.* (*Directors*) v. *Broadbent* (1859), 7 H. L. Cas. 600. Even before the Judicature Acts a Court of Chancery could determine the question and grant a perpetual injunction without requiring the plaintiff first to establish his right at law, if a case was presented which satisfied the court that such a course, if adopted, would do justice between the parties (*Bacon* v. *Jones* (1839), 4 My. & Cr. 433, 436, 437; *Potts* v. *Levy* (1854), 2 Drew. 272; and see *Gravely* v. *Barnard* (1874), L. R. 18 Eq. 518 (where the question of law was decided on the motion, on the ground that the effect of leaving it to the hearing would be to ruin one of the parties)). As a general rule, however, where the plaintiff's legal right was disputed, the court would not grant a perpetual injunction without putting the plaintiff to establish his right at law (*Motley* v. *Downman* (1837), 3 My. & Cr. 1, 14, 17; *Bramwell* v. *Halcomb* (1836), 3 My. & Cr. 737; *Harman* v. *Jones* (1841), Cr. & Ph. 299; *Norton* v. *Nicholls* (1858), 4 K. & J. 475; *Cardiff Corporation* v. *Cardiff Waterworks Co.* (1859), 4 De G. & J. 596, C. A.), unless there was no possible defence or no conflict of evidence whatever (*Eaden* v. *Firth* (1863), 1 Hem. & M. 573), or the circumstances of the case were very special (as in *Bacon* v. *Jones*, *supra*, *Potts* v. *Levy*, *supra*, and *Gravely* v. *Barnard*, *supra*).

(*a*) *Imperial Gas Light and Coke Co.* (*Directors*) v. *Broadbent*, *supra*, at p. 612; *Fullwood* v. *Fullwood* (1878), 9 Ch. D. 176; *Martin* v. *Price*, [1894] 1 Ch. 276, 285, C. A. For this purpose the award of an arbitrator is equivalent to a verdict (*Imperial Gas Light and Coke Co.* (*Directors*) v. *Broadbent*, *supra*).

(*b*) *Pennington* v. *Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *Jones* v. *Llanrwst Urban Council*, [1911] 1 Ch. 393, 402.

(*c*) *Chester* (*Dean and Chapter*) v. *Smelting Corporation, Ltd.* (1901), 85 L. T. 67.

(*d*) *Dunning* v. *Grosvenor Dairies, Ltd.*, [1900] W. N. 265; *Carr & Co.* v. *Bath Gas Light and Coke Co.*, [1900] W. N. 265, n.; *Batcheller* v. *Tunbridge Wells Gas Co.* (1901), 84 L. T. 765; *Barber* v. *Penley*, [1893] 2 Ch. 447, 460; *Chester* (*Dean and Chapter*) v. *Smelting Corporation, Ltd.*, *supra*.

(*e*) *Davies* v. *Marshall* (No. 1) (1861), 1 Drew. & Sm. 557, 560; explaining *Bacon* v. *Jones*, *supra*; *Gale* v. *Abbot* (1862), 8 Jur. (N. S.) 987.

(*f*) *Day* v. *Snee* (1814), 3 Ves. & B. 170.

(*g*) See pp. 217 *et seq.*, *post*.

be treated as the trial of the action, a perpetual injunction can then be granted on motion in a proper case (*h*).

When granted.

An injunction will, as a rule, be granted if it will restore or tend to restore the plaintiff to the position in which he stood previously to the commission of the acts complained of, and in which he has a right to stand, and if the injury complained of is of such a nature that damages will not be an adequate compensation (*i*).

When damage is small.

The fact that only very small or nominal damages have been recovered in the action is not, of itself, a sufficient ground for refusing an injunction (*k*): but it will be taken into consideration, for the court has regard to all the surrounding circumstances in considering whether or not it should grant an injunction, and does not confine itself to the dry strict rights of the plaintiff and defendant (*l*).

Third parties.

459. The position and rights of third parties or strangers to the suit will be considered (*m*), but the mere fact that a plaintiff sues at the instigation of another is not of itself sufficient to prevent him from obtaining an injunction on the merits of the case (*n*).

Damages the proper remedy.

460. It is the very first principle of injunction law that *primâ facie* the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy (*o*). But the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages (*p*). So, also, an injunction will not be granted if the injury complained of is capable of being adequately compensated by a money payment (*q*), especially when the plaintiff has himself treated the case as one for compensation (*r*).

(*h*) *Aslatt* v. *Southampton Corporation* (1880), 16 Ch. D. 143, 150; *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345, 354; and see *Morrell* v. *Pearson* (1849), 12 Beav. 284 (where an interlocutory order was by consent made perpetual on motion); *Wilkinson* v. *Cummins* (1853), 11 Hare, 337, 342.

(*i*) *Wood* v. *Sutcliffe* (1851), 2 Sim. (N. S.) 163; *Imperial Gas Light and Coke Co. (Directors)* v. *Broadbent* (1859), 7 H. L. Cas. 600; *Pennington* v. *Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A. As to damages, see p. 212, *post*.

(*k*) *Rochdale Canal Co.* v. *King* (1851), 2 Sim. (N. S.) 78; *Wood* v. *Sutcliffe*, *supra*, at p. 166.

(*l*) *Wood* v. *Sutcliffe*, *supra*, at p. 165; *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1877), 6 Ch. D. 757.

(*m*) *Maythorne* v. *Palmer* (1864), 11 Jur. (N. S.) 230.

(*n*) *Colman* v. *Eastern Counties Rail. Co.* (1846), 10 Beav. 1.

(*o*) *London and Blackwall Rail. Co.* v. *Cross* (1886), 31 Ch. D. 354, C. A., *per* LINDLEY, L.J., at p. 369. In *Hodgson* v. *Duce* (1856), 4 W. R. 576, where the defendant was a pauper, the plaintiff was granted an injunction to restrain him from trespassing, on the ground that, as against a pauper, damages did not constitute an adequate remedy; and see p. 215, *post*. For the principles on which the court acts in awarding damages in lieu of an injunction, see p. 212, *post*.

(*p*) *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 604, 616; *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, 238, C. A.

(*q*) *Wood* v. *Sutcliffe*, *supra*.

(*r*) *Gort* (*Viscountess*) v. *Clark* (1868), 18 L. T. 343, C. A.; and see p. 236, *post*.

SECT. 1. **Perpetual Injunction.**

Injury as well as damage necessary.

Mere inconvenience is not enough to entitle a party to an injunction. There must be violation of a legal right (*s*), and the violation must be of a substantial character (*t*). Nor will an injunction be granted where the plaintiff has a remedy in his own power (*a*). So, also, in the absence of any covenant not to do an act (*b*), an injunction will be refused where the damage complained of as the result of the act is not susceptible of appreciation (*c*). Moreover, the court will not order a party to do an act unless it is satisfied that he can do it (*d*), and sometimes, where the granting of the injunction would place the defendants in a position of extreme difficulty and might prove unnecessarily oppressive, the court will, instead of granting an injunction, make a declaration establishing the plaintiff's right to relief, and give the defendants a reasonable time to do what is necessary to cure the mischief, with liberty to the plaintiffs to apply at the end of that time for an injunction (*e*).

Matters to be considered when injunction applied for.

461. In the case of a negative covenant the court will enforce compliance by injunction without regard to the question of convenience or the amount of damage caused; but where an injunction is sought in respect of an affirmative covenant, the court will consider whether the injury it is asked to restrain is an injury which, if done, can be remedied, whether or not it is an injury which can be sufficiently atoned for in damages, whether if the act was done the right to damages for it could be decided exhaustively once and for all by one action, or whether a series of actions would be necessary for the purpose of recovering damages from time to time, and whether the effect of assisting the plaintiff would be to cause possible damage to the defendant very much greater than any possible advantage which the plaintiff would derive (*f*).

Threatened invasion of legal right.

462. Where a plaintiff has established his legal right and the fact of its infringement and that further infringement is threatened to a material extent, he is entitled to an injunction to restrain such threatened infringement upon the ordinary legal principles upon

(*s*) *Day* v. *Brownrigg* (1878), 10 Ch. D. 294, C. A.; *Street* v. *Union Bank of Spain and England* (1885), 30 Ch. D. 156. Nor will an injunction be granted to prevent annoyances by a mere stranger (*Best* v. *Drake* (1853), 1 W. R. 229).

(*t*) *Llandudno Urban Council* v. *Woods*, [1899] 2 Ch. 705, 710; *Behrens* v. *Richards*, [1905] 2 Ch. 614, 622; and see *Martin* v. *Douglas* (1867), 16 W. R. 268, 270; *Leahy, Kelly and Leahy* v. *Glover* (1893), 10 R. P. C. 141, 160, H. L.; *Rutter & Co.* v. *Smith* (1900), 18 R. P. C. 49.

(*a*) *Elliman, Sons & Co.* v. *Carrington & Son, Ltd.*, [1901] 2 Ch. 275, 279.

(*b*) See, in the case of contracts, pp. 235 *et seq.*, *post.*

(*c*) *Ingram* v. *Morecraft* (1863), 33 Beav. 49.

(*d*) *A.-G.* v. *Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146, 154; *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, 127, C. A.; *A.-G.* v. *Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A.; *Evans* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1887), 36 Ch. D. 626, 639; *A.-G.* v. *Clerkenwell Vestry*, [1891] 3 Ch. 527; and see *Charles* v. *Finchley Local Board* (1883), 23 Ch. D. 767.

(*e*) *Islington Vestry* v. *Hornsey Urban Council*, [1900] 1 Ch. 695; and see *Wood* v. *Sutcliffe* (1851), 2 Sim. (N. S.) 163; *Smith* v. *Baxter*, [1900] 2 Ch. 138.

(*f*) *Doherty* v. *Allman* (1878), 3 App. Cas. 709, *per* Lord CAIRNS, L.C., at p. 720; and see *Cooke* v. *Forbes* (1867), L. R. 5 Eq. 166; *McEacharn* v. *Colton*, [1902] A. C. 104, 107, P. C.

which the court acts in granting injunctions (*g*). If the plaintiff's right to relief rests mainly on damage which has not been actually suffered but is likely to accrue within a reasonable time, the court will take that fact into consideration and grant an injunction (*h*). So, also, where the plaintiff's legal right is not disputed an injunction may be granted to restrain the commission of an apprehended or threatened act, on the ground that the act, if done, will violate the plaintiff's legal right, if he can show a strong case of probability that the apprehended mischief will in fact arise (*i*). The mere fact that the defendant denies any intention of committing the act complained of is not of itself a sufficient ground for refusing relief (*k*), but an injunction may not be granted if the defendant, even though he asserts his right to do the act, not only says that he has no present intention of doing it, but undertakes to give reasonable and sufficient notice before attempting to do it (*l*). So also where, on the defendant being served with the writ, the plaintiff is offered and may obtain all the relief that he seeks, and the offer is one which he ought to have accepted, an injunction may be refused (*m*). Nor will the court restrain future acts of a wrongdoer unless it is plain that they will be of a wrongful nature (*n*). Where there seems to be no probability that the act complained of will be repeated, the court will sometimes make a declaration only, with liberty to apply for an injunction if necessary (*o*).

If, however, the defendant claims and insists upon his right (*p*),

(*g*) *Martin* v. *Price*, [1894] 1 Ch. 276; *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A.; *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, C. A.; *Cowper* v. *Laidler*, [1903] 2 Ch. 337.

(*h*) *Dicker* v. *Popham, Radford & Co.* (1890), 63 L. T. 379. The possible future application of the plaintiff's premises is an element to be taken into consideration in an action to restrain the obstruction of ancient lights (*ibid.*). See also *Hodges* v. *London Trams Co.* (1883), 12 Q. B. D. 105, where the plaintiff who, as manager of the defendant company, had become under the statutes and rules for the regulation of stage carriages the licensee of its vehicles, on ceasing to be such manager was granted an injunction restraining the company from using his name upon the number plates on its carriages.

(*i*) *Crowder* v. *Tinkler* (1816), 19 Ves. 617, 622; *Ripon (Earl)* v. *Hobart* (1834), 3 My. & K. 169; *Haines* v. *Taylor* (1846), 10 Beav. 75; *Hertz* v. *Union Bank of London* (1854), 24 L. T. (o. s.) 186, C. A.; *Hepburn* v. *Lordan* (1865), 2 Hem. & M. 345; *A.-G.* v. *Kingston-upon-Thames Corporation* (1865), 34 L. J. (CH.) 481; *Dunn* v. *Bryan* (1872), 7 I. R. Eq. 143; *Pattisson* v. *Gilford* (1874), L. R. 18 Eq. 259; *Goodhart* v. *Hyett* (1883), 25 Ch. D. 182; *Fletcher* v. *Bealey* (1885), 28 Ch. D. 688; *Phillips* v. *Thomas* (1890), 62 L. T. 793; *A.-G.* v. *Manchester Corporation*, [1893] 2 Ch. 87; *A.-G.* v. *Rathmines and Pembroke Joint Hospital Board*, [1904] 1 I. R. 161; *A.-G.* v. *Nottingham Corporation*, [1904] 1 Ch. 673.

(*k*) *Jackson* v. *Cator* (1800), 5 Ves. 688; and see *Potts* v. *Levy* (1854), 2 Drew. 272, 279. It is not sufficient ground for granting an injunction, however, that if there be no such intention, it will do the defendant no harm (*Dunn* v. *Bryan* (1872), 7 I. R. Eq. 143; and see p. 218, *post*).

(*l*) *Cowley* (*Lord*) v. *Byas* (1877), 5 Ch. D. 944, C. A.

(*m*) *Jenkins* v. *Hope*, [1896] 1 Ch. 278; and see *Proctor* v. *Bayley* (1889), 42 Ch. D. 390, C. A. But the plaintiff has a right to have the undertaking given in court (*Jenkins* v. *Hope*, *supra*).

(*n*) *Aldebert* v. *Leaf* (1864), 3 New Rep. 455.

(*o*) *Wilcox* v. *Steel*, [1904] 1 Ch. 212, C. A.

(*p*) *Tipping* v. *Eckersley* (1855), 2 K. & J. 264; *Phillips* v. *Thomas*, *supra*.

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or gives distinct notice of his intention (*q*), or threatens (*r*), or intends (*s*), to commit an act which, if committed, would, in the opinion of the court, violate the plaintiff's legal right, an injunction will be granted.

Acquiescence and delay.

463. The principles upon which the court acts in refusing to grant interlocutory injunctions on the ground of acquiescence (*t*) apply also to the case of perpetual injunctions (*a*), but to justify the court in refusing relief at the hearing there must be a stronger case of acquiescence than is required upon an interlocutory application (*b*). If, however, a man stands by and knowingly, though passively, encourages another to expend money under an erroneous belief as to his rights and then comes to the court for relief by way of a perpetual injunction, it will be refused, and he will be left to his remedy, if any, in damages (*c*). But delay in applying to the court, although it excites the diligence of the court to ascertain whether the plaintiff has stood by and voluntarily suffered his right to be infringed, is no bar if it can be satisfactorily explained (*d*). Moreover, the court will not on light grounds act against the legal rights of parties; there must be fraud or such acquiescence as in the view of the court would make it a fraud afterwards to insist on the legal right (*e*).

Delay.

Subject to any statutory bar, mere delay in bringing an action in aid of the legal right is not sufficient to deprive the plaintiff of

(*q*) *A.-G.* v. *Forbes* (1836), 2 My. & Cr. 123, 132.

(*r*) *Potts* v. *Levy* (1854), 2 Drew. 272, 279; *Adair* v. *Young* (1879), 12 Ch. D. 13, C. A.

(*s*) *Hext* v. *Gill* (1872), 7 Ch. App. 699, 711; *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501, 507.

(*t*) See pp. 219 *et seq.*, *post.*

(*a*) *Re Brittain, Ex parte White* (1835), 4 L. J. (BCY.) 50; see, for example, *Gaunt* v. *Fynney* (1872), 8 Ch. App. 8; *Rogers* v. *Great Northern Rail. Co.* (1889), 53 J. P. 484.

(*b*) *Patching* v. *Dubbins* (1853), Kay, 1; *Child* v. *Douglas* (1854), 5 De G. M. & G. 739, C. A.; *Johnson* v. *Wyatt* (1863), 2 De G. J. & Sm. 18, C. A.; *Turner* v. *Mirfield* (1865), 34 Beav. 390; *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444; *Price* v. *Bala and Festiniog Rail. Co.* (1884), 50 L. T. 787. The reason being that at the hearing of the cause it is the duty of the court to decide upon the rights of the parties, and the dismissal of the action on the ground of acquiescence amounts to a decision that a right, which once existed, is absolutely and for ever lost (*Johnson* v. *Wyatt*, *supra*, at p. 25; and see *Gordon* v. *Cheltenham and Great Western Union Rail. Co.* (1842), 5 Beav. 229, *per* Lord LANGDALE, M.R., at p. 233).

(*c*) *Dann* v. *Spurrier* (1802), 7 Ves. 231; *Parrott* v. *Palmer* (1834), 3 My. & K. 632, 640; *Leeds* (*Duke*) v. *Amherst* (*Earl*) (1846), 2 Ph. 117, 123; *Rochdale Canal Co.* v. *King* (1851), 2 Sim. (N. S.) 78; *Wood* v. *Sutcliffe* (1851), 2 Sim. (N. S.) 163; *Cotching* v. *Bassett* (1862), 32 Beav. 101; *Davies* v. *Sear* (1869), L. R. 7 Eq. 427; *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444. And a party may so encourage that which he afterwards complains of as a nuisance, as not only to preclude himself from complaining of it, but to give the adverse party a right to protection, in the event of his so doing (*Williams* v. *Jersey* (*Earl*) (1841), Cr. & Ph. 91, 97).

(*d*) *Crossley* v. *Derby Gas Light Co.* (1834), 4 L. J. (CH.) 25.

(*e*) *Macher* v. *Foundling Hospital* (1813), 1 Ves. & B. 188; *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. 414, 433, 434; *Bankhart* v. *Houghton* (1859), 27 Beav. 425; *A.-G.* v. *Leeds Corporation* (1870), 5 Ch. App. 583; *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444; *Smith* v. *Smith* (1875), L. R. 20 Eq. 500; *Willmott* v. *Barber* (1880), 15 Ch. D. 96, 105; *Russell* v. *Watts* (1883), 25 Ch. D. 559, 576, C. A.; reversed (1885), 10 App. Cas. 590; *Proctor* v. *Bennis* (1887), 36 Ch. D. 740, 760.

his rights (*f*); but long abstention from the assertion of his rights, coupled with an alteration of the condition of other parties, may render it unconscientious on his part to enforce his rights (*g*).

Suspending injunction.

464. Sometimes the operation of the injunction will be postponed until a certain date, if there is a possibility of the parties being able to come to some arrangement (*h*), but not where the injunction applies solely to the erection or construction of new works in the future (*i*). So also where a good deal of time must necessarily elapse to enable the defendants, without being put to grievous annoyance and expense, to comply with an injunction, the court, in granting a perpetual injunction, will postpone its operation for such time as may be necessary to enable them to comply with it, with liberty to any of the parties to apply in the meantime (*j*). If an injunction, refused by a court of first instance, is granted on appeal, but its operation is suspended, application for a further suspension should be made to the court of first instance (*k*).

Effect of appeal.

465. An appeal does not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from or any judge thereof or the Court of Appeal may direct; and no intermediate act or proceeding will be invalidated, except so far as the court appealed from directs (*l*). The fact that an appeal is pending, is no bar to the granting of a perpetual injunction (*m*), at any rate where the court does not feel any doubt as to the justice of the decision under appeal (*n*), nor is it, of itself, a sufficient ground for postponing the operation of the injunction (*o*), though, if irreparable damage (*p*) will be done to the appellant in the meantime, the operation of the injunction may be stayed on terms (*q*). Mere inconvenience or annoyance is not enough to induce the court to take away from a successful party the benefit of his decree (*r*).

(*f*) *Fullwood* v. *Fullwood* (1878), 9 Ch. D. 176; *London, Chatham and Dover Rail. Co.* v. *Bull* (1882), 47 L. T. 413, 416; *Northumberland* (*Duke*) v. *Bowman* (1887), 56 L. T. 773, 775; *Rowland* v. *Michell* (1896), 75 L. T. 65; and see *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444; and titles EQUITY, Vol. XIII., pp. 168, 169; LIMITATION OF ACTIONS.

(*g*) *Archbold* v. *Scully* (1861), 9 H. L. Cas. 360; *Gale* v. *Abbot* (1862), 8 Jur. (N. S.) 987, 989.

(*h*) *Jessel* v. *Chaplin* (1856), 2 Jur. (N. S.) 931; *Smith* v. *Smith* (1875), L. R. 20 Eq. 500; *Shiel* v. *Godfrey & Co.*, [1893] W. N. 115.

(*i*) *A.-G.* v. *Acton Local Board* (1882), 22 Ch. D. 221.

(*j*) *A.-G.* v. *Bradford Canal* (*Proprietors*) (1866), L. R. 2 Eq. 71, 84; see *Pennington* v. *Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769, 774; *Jones* v. *Llanrwst Urban Council*, [1911] 1 Ch. 393, 411.

(*k*) *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *Same*, [1895] 2 Ch. 388, C. A.

(*l*) R. S. C., Ord. 58, r. 16.

(*m*) *A.-G.* v. *Bradford Canal* (*Proprietors*), *supra*; *Penn* v. *Bibby*, *Penn* v. *Jack*, *Penn* v. *Fernie* (1866), L. R. 3 Eq. 308.

(*n*) *A.-G.* v. *Bradford Canal* (*Proprietors*), *supra*, at p. 79.

(*o*) *Ibid.*, at p. 83.

(*p*) See p. 218, *post*.

(*q*) *Walford* v. *Walford* (1868), 3 Ch. App. 812, 814. As to staying the operation of injunctions in patent cases pending an appeal, see title PATENTS.

(*r*) *Walford* v. *Walford*, *supra*, at p. 814.

SECT. 1. Perpetual Injunction.

Dealings with a fund.

In an action to determine the rights of claimants to a fund there is jurisdiction to grant an injunction to restrain all dealings with the fund pending an appeal (*a*). This jurisdiction (*b*) ought, however, to be very carefully exercised, and so as not to encourage anyone to present an appeal for the purposes of delay (*c*).

SUB-SECT. 2.—*Damages in lieu of Injunction.*

Jurisdiction to award damages in lieu of injunction.

466. The High Court of Justice has power (*d*), under its general jurisdiction, to award either damages or an injunction (*e*).

The power of awarding damages in lieu of an injunction is a discretionary power (*f*), which must be exercised with an intimate knowledge of the facts (*g*). It must be exercised so as to prevent people being compelled to sell their property against their will at a valuation (*h*), or to prevent a defendant from doing a wrongful

(*a*) *Wilson* v. *Church* (1879), 11 Ch. D. 576, C. A.; *Polini* v. *Gray*, *Sturla* v. *Freccia* (1879), 12 Ch. D. 438, C. A.; R. S. C., Ord. 50, r. 3; but see *Galloway* v. *London Corporation* (No. 2) (1865), 3 De G. J. & Sm. 59.

(*b*) It is based upon the principle which underlies all orders for the preservation of property pending litigation, namely, that the ultimately successful party is to reap the fruits of the litigation and not merely to obtain a barren success (*Polini* v. *Gray*, *Sturla* v. *Freccia*, *supra*, *per* JESSEL, M.R., at p. 443).

(*c*) *Ibid.*, *per* COTTON, L.J., at p. 446.

(*d*) Since the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66); see *ibid.*, s. 24 (1). The Court of Chancery had power by the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2, to award damages either in addition to or in substitution for an injunction, if it should think fit, in every case in which it could grant an injunction. This Act, commonly known as Lord Cairns' Act, remained in force notwithstanding the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66) (see *Fritz* v. *Hobson* (1880), 14 Ch. D. 542); and although it was repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 3, the jurisdiction was continued by virtue of s. 5 (*ibid.*) (*Sayers* v. *Collyer* (1884), 28 Ch. D. 103, C. A. (considered in *Re R.*, [1906] 1 Ch. 730, C. A.); *Dreyfus* v. *Peruvian Guano Co.* (1889), 42 Ch. D. 66, 73; see also *Holland* v. *Worley* (1884), 26 Ch. D. 578; *Serrao* v. *Noel* (1885), 15 Q. B. D. 549, C. A.; *Greenwood* v. *Hornsey* (1886), 33 Ch. D. 471; *Chapman*, *Morsons & Co.* v. *Auckland Union Guardians* (1889), 23 Q. B. D. 294, C. A.; *Dicker* v. *Popham*, *Radford & Co.* (1890), 63 L. T. 379; *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A.; *Cowper* v. *Laidler*, [1903] 2 Ch. 337).

(*e*) It is therefore no longer necessary to resort to the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2 (*Sayers* v. *Collyer*, *supra*, at p. 109; *Serrao* v. *Noel*, *supra*). The powers of the court are now larger than those possessed under that Act; see *Elmore* v. *Pirrie* (1887), 57 L. T. 333, *per* KAY, J., at p. 335; and title EQUITY, Vol. XIII., p. 51.

(*f*) *Durell* v. *Pritchard* (1865), 1 Ch. App. 244; *Smith* v. *Smith* (1875), L. R. 20 Eq. 500; *Holland* v. *Worley*, *supra*; *Greenwood* v. *Hornsey*, *supra*.

(*g*) *Greenwood* v. *Hornsey*, *supra*.

(*h*) *Dent* v. *Auction Mart Co.*, *Pilgrim* v. *Same*, *Mercers' Co.* v. *Same* (1866), L. R. 2 Eq. 238, 246; *Aynsley* v. *Glover* (1874), L. R. 18 Eq. 544, 552; *Krehl* v. *Burrell* (1878), 7 Ch. D. 551; affirmed (1879), 11 Ch. D. 146, C. A.; *Holland* v. *Worley*, *supra*; *Greenwood* v. *Hornsey*, *supra*, at p. 477; *Cowper* v. *Laidler*, *supra*, at p. 341; *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, *supra*; *Martin* v. *Price*, [1894] 1 Ch. 276, C. A.; and see *Gilling* v. *Gray* (1910), 27 T. L. R. 39; *Woodhouse* v. *Newry Navigation Co.*, [1898] 1 I. R. 161, C. A.

act and thinking that he can pay damages for it (*i*). The question whether the defendant knew that he was wrong is of importance (*k*).

Smallness of damage immaterial.

467. The mere fact that the damage is small is not decisive (*l*), but if the court is of opinion that the plaintiff's property will remain substantially as useful to him as before the act complained of, and that the injury can, without taking away the plaintiff's property from him, be compensated by money, an injunction need not be granted (*m*).

Damages may be awarded where intention to continue wrongful act.

468. Where the act complained of has been done and there is an intention to continue it, damages may be granted (*n*), but where no wrongful act has been committed but an injury is threatened, then there is no power to give damages in lieu of an injunction (*o*). In the case of a continuing actionable nuisance the jurisdiction to award damages ought only to be exercised in very exceptional circumstances (*p*).

Effect of acquiescence.

469. Acquiescence (*q*) will also be taken into account in considering whether an injunction or damages should be granted (*r*), and an amount of acquiescence, not sufficient to bar the action, may be sufficient to induce the court to give damages instead of an injunction (*s*). A plaintiff may by his acquiescence preclude himself even from recovering damages (*t*).

Effect of resulting benefit.

470. Although the court cannot hold an injury compensated for by a benefit which results from it, yet the fact that a benefit does

(*i*) *Smith* v. *Smith* (1875), L. R. 20 Eq. 500, 505; *Holland* v. *Worley* (1884), 26 Ch. D. 578.

(*k*) *Smith* v. *Smith*, *supra*.

(*l*) *Marriott* v. *East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70; *Goodson* v. *Richardson* (1874), 9 Ch. App. 221.

(*m*) *Holland* v. *Worley*, *supra*; *Rileys* v. *Halifax Corporation* (1907), 97 L. T. 278. As a good working rule, damages in substitution for an injunction may be given where the injury to the plaintiff's legal rights (1) is small, (2) is capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction (*Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A., *per* A. L. SMITH, L.J., at p. 322).

(*n*) *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, *supra*, at p. 319; *Cowper* v. *Laidler*, [1903] 2 Ch. 337; *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A. C. 179; *Kine* v. *Jolly*, [1905] 1 Ch. 481, C. A.; affirmed [1907] A. C. 1.

(*o*) *Dreyfus* v. *Peruvian Guano Co.* (1889), 43 Ch. D. 316, C. A.; but see *Martin* v. *Price*, [1894] 1 Ch. 276, 284, C. A.

(*p*) *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, *supra*; see *Pennington* v. *Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769. But see, in cases of obstruction of light, *Colls* v. *Home and Colonial Stores, Ltd.*, *supra*.

(*q*) As to the effect of acquiescence on the plaintiff's right to an injunction, see p. 210, *ante*.

(*r*) *Lockwood* v. *London and North-Western Rail. Co.* (1868), 19 L. T. 68; *Sayers* v. *Collyer* (1885), 28 Ch. D. 103, C. A.; and see *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, *supra*, at p. 322.

(*s*) *Sayers* v. *Collyer*, *supra*.

(*t*) *Kelsey* v. *Dodd* (1881), 52 L. J. (CH.) 34; *Sayers* v. *Collyer*, *supra*.

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result to the plaintiff from the act complained of is an element to be considered in deciding whether an injunction should be granted or damages given (*a*).

Damages must cover whole area which would be covered by injunction.

471. Where damages are awarded in substitution for an injunction they must, in order to be an adequate substitute therefor, cover the whole area which would be covered by the injunction (*b*), and must therefore comprise damages which accrued after, as well as damages which accrued before, the issue of the writ (*c*), even though the wrongful act has come to an end before the trial (*d*). Where an injunction is granted and the plaintiff also claims general damages as ancillary to the real remedy sought, he is not entitled to substantial damages, but is entitled to recover something as an acknowledgment of the wrong he has suffered (*e*).

If, in an action for an injunction and compensation in damages, the substantial relief claimed is obtained before the action comes on for hearing, the plaintiff will not be thereby deprived of his right to damages in respect of the injury occasioned to him by the delay of the defendants in rectifying the injury (*f*).

Specific claim.

472. Under Lord Cairns' Act (*g*) damages need not be specifically claimed (*h*).

When damages may be refused.

473. Where an injunction is asked for on the ground that damages do not afford an adequate remedy, damages in respect of past injury may be given in addition to the injunction (*i*), but an inquiry as to damages will not be ordered if the plaintiff has opened a case of substantial injury, entitling him to an injunction and damages, and has failed to prove any substantial damage (*j*).

Assessment of damages.

474. In a proper case damages may be assessed in court without an inquiry (*k*). No appeal lies against an assessment of damages,

(*a*) *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1877), 6 Ch. D. 757, 769.

(*b*) *Fritz* v. *Hobson* (1880), 14 Ch. D. 542, *per* FRY, J., at p. 557; see *Mold* v. *Wheatcroft* (1860), 30 L. J. (CH.) 598.

(*c*) *Fritz* v. *Hobson, supra; Chapman, Morsons & Co.* v. *Auckland Union Guardians* (1889), 23 Q. B. D. 294, C. A.; *Warwick and Birmingham Canal Navigation Co.* v. *Burman* (1890), 63 L. T. 670; R. S. C., Ord. 36, r. 58.

(*d*) *Davenport* v. *Rylands* (1865), L. R. 1 Eq. 302; *Fritz* v. *Hobson, supra.*

(*e*) *Lipman* v. *Pulman* (*George*) *& Sons, Ltd.* (1904), 91 L. T. 132.

(*f*) *Cory* v. *Thames Iron Works and Ship Building Co.* (1863), 11 W. R. 589 (a specific performance case).

(*g*) Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27).

(*h*) *Catton* v. *Wyld* (1863), 32 Beav. 266; *Betts* v. *Neilson* (1868), 3 Ch. App. 429, 441; *Stanley of Alderley* (*Lady*) v. *Shrewsbury* (*Earl*) (1875), L. R. 19 Eq. 616; *Crawford* v. *Hornsea Steam Brick and Tile Co.* (1876), 45 L. J. (CH.) 432, C. A. (in this case a memorandum of the decree was directed to be indorsed on the plaintiff's title-deeds); and see *Bowen* v. *Hall* (1881), 6 Q. B. D. 333, C. A.

(*i*) *Pennington* v. *Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; see *contra, Eardley* v. *Granville* (*Lord*) (1876), 24 W. R. 528; and compare *Martin* v. *Price*, [1894] 1 Ch. 276, C. A. (where damages were given in respect of injury actually caused, and an injunction granted to prevent further injury).

(*j*) *Kino* v. *Rudkin* (1877), 6 Ch. D. 160.

(*k*) *Crawford* v. *Hornsea Steam Brick and Tile Co., supra,* more fully reported on this point in [1876] W. N. 28, 132, C. A.; and see *Holland* v. *Worley* (1884), 26 Ch. D. 578, 587.

unless it can be shown that the court acted on a wrong principle in arriving at the amount (*l*).

Damages and an account cannot be decreed.

475. In no case will an inquiry into damages and also an account (*m*) be ordered. The party who has obtained a decree must elect which of the two forms of relief he will adopt (*n*).

SUB-SECT. 3.—*Mandatory Injunction.*

Mandatory injunction.

476. Where the injury done to the plaintiff cannot be estimated and sufficiently compensated for by damages (*o*), or is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done (*p*), or where the injury complained of is in breach of an express agreement (*q*), the court will exercise its jurisdiction and grant a mandatory injunction (*r*), even though the expense and trouble of carrying out the mandatory injunction will be far in excess of any sum which could reasonably be awarded by way of damages (*s*). If, on the other hand, no substantial damage is proved or the injury admits of estimation and the evil can be abundantly compensated for by damages, a mandatory injunction will not be granted, but an inquiry will be ordered to ascertain the amount of the damages sustained (*a*).

May be granted although act completed.

477. A mandatory injunction may be granted although the act sought to be restrained has been nearly or entirely completed before the action is commenced (*b*), but it will only be granted in such

(*l*) *Ball* v. *Ray* (1873), 22 W. R. 283.

(*m*) See p. 201, *ante*.

(*n*) *De Vitre* v. *Betts* (1873), L. R. 6 H. L. 319.

(*o*) *Isenberg* v. *East India House Estate Co., Ltd.* (1863), 3 De G. J. & Sm. 263.

(*p*) *Kelk* v. *Pearson* (1871), 6 Ch. App. 809; *Smith* v. *Smith* (1875) L. R. 20 Eq. 500. But in the case of trespass the mere fact that the damage suffered is small is immaterial (*Goodson* v. *Richardson* (1874), 9 Ch. App. 221, applied in *Marriott* v. *East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70); and see p. 233, *post*.

(*q*) *Morris* v. *Grant* (1875), 24 W. R. 55; *McManus* v. *Cooke* (1887), 35 Ch. D. 681; *Manners* (*Lord*) v. *Johnson* (1875), 1 Ch. D. 673; and see p. 238, *post*.

(*r*) See also *Krehl* v. *Burrell* (1878), 7 Ch. D. 551; affirmed (1879), 11 Ch. D. 146, C. A.; *Home and Colonial Stores, Ltd.* v. *Colls*, [1902] 1 Ch. 302, C. A.; reversed, [1904] A. C. 179, on the ground that the diminution of light therein complained of was insufficient to constitute an actionable obstruction. As to the grant of a mandatory injunction on an interlocutory application, see p. 223, *post*.

(*s*) *Woodhouse* v. *Newry Navigation Co.*, [1898] 1 I. R. 161, 168, C. A.

(*a*) *Isenberg* v. *East India House Estate Co., Ltd.*, *supra*; *Edleston* v. *Crossley & Sons* (1868), 18 L. T. 15; *Stanley of Alderley* (*Lady*) v. *Shrewsbury* (*Earl*) (1875), L. R. 19 Eq. 616; *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1877), 6 Ch. 757; *Allen* v. *Seckham* (1879), 11 Ch. D. 790, 798, C. A.; *Martin* v. *Price*, [1894] 1 Ch. 276. The court may, as part of the compensation, order any works to be done by the defendant for the benefit of the plaintiff (*Isenberg* v. *East India House Estate Co., Ltd.*, *supra*).

(*b*) *Holmes* v. *Upton* (1840), cited (1873), 9 Ch. App. 214, n.; *Goodson* v. *Richardson*, *supra*; *Smith* v. *Smith*, *supra*; *Morris* v. *Grant*, *supra* (an interlocutory motion); *Lawrence* v. *Horton* (1890), 59 L. J. (CH.) 440; *Shiel* v. *Godfrey & Co.*, [1893] W. N. 115, where injunctions were granted;

SECT. 1. Perpetual Injunction.

cases to prevent extreme or very serious damage (*c*). Where a building is the subject of the litigation, it is material to consider, as one of the circumstances of the case, the condition in which the building was when complaint was first made (*d*). The court may even order a building to be pulled down although it has been erected and completed and works carried on within it for some months without complaint (*e*), but it will not readily do so, where buildings have been erected without complaint (*f*).

Effect of notice of objection.

If distinct notice of objection is given before the completion of the act complained of, but it is nevertheless persisted in (*g*), or if the defendant on an interlocutory application gives an undertaking to undo what he has done if so ordered at the trial (*h*), the court is more disposed to grant a mandatory injunction than where no complaint is made till after the completion. Every case, however, depends upon its own peculiar circumstances, and the mere fact that the act complained of was persisted in after notice of objection is not of itself sufficient to justify the granting of a mandatory injunction if, in all the circumstances of the case, damages would be an adequate remedy (*i*).

Acquiescence and delay.

478. A party seeking a mandatory injunction should apply promptly, but mere delay is not a bar if it can be satisfactorily accounted for (*k*), nor will a plaintiff be deemed to have acquiesced if, knowing that the defendant has a legal right to do a thing, he assumes that he is not going to use his right for an unlawful

Durell v. *Pritchard* (1865), 1 Ch. App. 244; *Edleston* v. *Crossley & Sons* (1868), 18 L. T. 15; *Sparling* v. *Clarson* (1869), 17 W. R. 518; *City of London Brewery Co.* v. *Tennant* (1873), 9 Ch. App. 212, 219; *Stanley of Alderley* (*Lady*) v. *Shrewsbury* (*Earl*) (1875), L. R. 19 Eq. 616, where injunctions were refused; and see *Lawrence* v. *Austin*, *Durell* v. *Pritchard*, *Dunball* v. *Walters* (1865), 11 Jur. (N. S.) 576, *per* ROMILLY, M.R., at p. 579.

(*c*) See the cases cited in note (*b*), p. 215, *ante*, other than *Morris* v. *Grant* (1875), 24 W. R. 55 (which was a case of express contract).

(*d*) *Lawrence* v. *Horton* (1890), 59 L. J. (CH.) 440. Even where the injury sustained is not such as would justify a mandatory injunction, the mere fact that the building has been completed before action brought does not prevent the court from giving damages (*City of London Brewery Co.* v. *Tennant*, *supra*; *Stanley of Alderley* (*Lady*) v. *Shrewsbury* (*Earl*), *supra*; and see *Cooper* v. *Hubbuck* (1860), 7 Jur. (N. S.) 457, 459).

(*e*) *Baxter* v. *Bower* (1875), 44 L. J. (CH.) 625, C. A.

(*f*) *Curriers' Co.* v. *Corbett* (1865), 13 L. T. 154, C. A.; *Gaskin* v. *Balls* (1879), 13 Ch. D. 324, C. A.

(*g*) *Coles* v. *Sims* (1854), 5 De G. M. & G. 1 (interlocutory); *Jacomb* v. *Knight* (1863), 8 L. T. 621, C. A.; *Hepburn* v. *Lordan* (1865), 2 Hem. & M. 345, 352; *Grand Junction Canal Co.* v. *Shugar* (1871), 6 Ch. App. 483; *Manners* (*Lord*) v. *Johnson* (1875), 1 Ch. D. 673; *Krehl* v. *Burrell* (1877), 7 Ch. D. 551, affirmed (1879), 11 Ch. D. 146, C. A.; *Smith* v. *Day* (1880), 13 Ch. D. 651, C. A.; and see *Woodhouse* v. *Newry Navigation Co.*, [1898] 1 I. R. 161, C. A.; *Black* v. *Scottish Temperance Life Assurance Co.*, [1908] 1 I. R. 541, H. L. Arguments of hardship and loss of value will not be listened to in cases of this sort (*Manners* (*Lord*) v. *Johnson*, *supra*, at p. 681).

(*h*) *Greenwood* v. *Hornsey* (1886), 33 Ch. D. 471.

(*i*) See *Isenberg* v. *East India House Estate Co., Ltd.* (1863), 3 De G. J. & Sm. 263; *Senior* v. *Pawson* (1866), L. R. 3 Eq. 330.

(*k*) *Gale* v. *Abbot* (1862), 8 Jur. (N. S.) 987; *A.-G.* v. *Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146; *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444; *Woodhouse* v. *Newry Navigation Co.*, *supra*.

purpose (*l*). A mandatory injunction will not, however, be granted where the plaintiff is guilty of unreasonable delay in applying for it and the granting of it would cause the defendant serious damage (*m*).

Repairs.

479. A mandatory order will not be made directing the defendant to do repairs (*n*).

Against an agent.

A mandatory injunction can be granted against a wrongdoer, although only acting as an agent (*o*).

SECT. 2.—*Interlocutory Injunction.*

SUB-SECT. 1.—*When an Interlocutory Injunction will be Granted.*

Principles upon which the court acts.

480. In cases of interlocutory injunctions in aid of the legal right, all the court usually has to consider is whether the case is so clear and free from objection on equitable grounds that it ought to interfere without waiting for the legal right to be established (*p*). This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the discretion of the court ought in all cases to be regulated (*q*). It is not necessary that the court should find a case which would entitle the plaintiff to relief at all events: it is quite sufficient if the court finds a case which shows that there is a substantial question to be investigated, and that matters ought to be preserved *in statu quo* until that question can be finally disposed of (*r*).

(*l*) *A.-G.* v. *Leeds Corporation* (1870), 5 Ch. App. 583; *Smith* v. *Smith* (1875), L. R. 20 Eq. 500.

(*m*) *Illingworth* v. *Manchester and Leeds Rail. Co.* (1840), 2 Ry. & Can. Cas. 187; *Senior* v. *Pawson* (1866), L. R. 3 Eq. 330; *Gaunt* v. *Fynney* (1872), 8 Ch. App. 8; *Rogers* v. *Great Northern Rail. Co.* (1889), 53 J. P. 484.

(*n*) *A.-G.* v. *Staffordshire County Council*, [1905] 1 Ch. 336.

(*o*) *Cohen* v. *Poland*, [1887] W. N. 159.

(*p*) *Saunders* v. *Smith* (1838), 3 My. & Cr. 711; *Mawman* v. *Tegg* (1826), 2 Russ. 385. In no case does the court grant an interlocutory injunction as of course (*Potter* v. *Chapman* (1750), Ambl. 98, 99).

(*q*) *Ibid.*; and see *Dalglish* v. *Jarvie* (1850), 2 Mac. & G. 231, 242. In the Chancery Division the modern tendency, however, is to avoid trying the same question on two occasions, and in ordinary cases only to grant interlocutory injunctions where the right to relief is clear.

(*r*) *Powell* v. *Lloyd* (1827), 1 Y. & J. 427; *Glascott* v. *Lang* (1838), 3 My. & Cr. 451; *Donnell* v. *Church and Clark* (1842), 4 I. Eq. R. 630; *Great Western Rail. Co.* v. *Birmingham and Oxford Junction Rail. Co.* (1848), 2 Ph. 597, 603; *Bradbury* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1851), 15 Jur. 1167; *De Mattos* v. *Gibson* (1859), 4 De G. & J. 276, 284; *Walker* v. *Jones* (1866), L. R. 1 P. C. 50, 61; *Preston* v. *Luck* (1884), 27 Ch. D. 497, C. A.; *Hilton* v. *Granville* (*Earl*) (1841), Cr. & Ph. 283; *Shrewsbury and Chester Rail. Co.* v. *Shrewsbury and Birmingham Rail. Co.* (1851), 1 Sim. (N. S.) 410, 426; *Jones* v. *Pacaya Rubber and Produce Co., Ltd.*, [1911] 1 K. B. 455, 459, C. A. Probability of right is sufficient (see *Tonson* v. *Walker* (1752), 3 Swan. 672, 679). On the principle of protecting property pending litigation, a defendant who claims to be a purchaser for value under a conveyance of an advowson, may be restrained, in a suit to impeach the conveyance, from instituting a clerk (*Greenslade* v. *Dare* (1853), 17 Beav. 502). As to the interference by the Court of Appeal with the judge's discretion, see *Baker* v. *White* (1884), 1 T. L. R. 64, C. A. Where goods are claimed by both parties to a suit and all matters in dispute have been referred to arbitration, an interlocutory injunction will be granted to prevent the sale of the goods pending the arbitration (*Garrett* v. *Salisbury and Dorset Junction Rail. Co.* (1866), L. R. 2 Eq. 358).

SECT. 2. Interlocutory Injunction.

Threatened injury.

481. An interlocutory injunction will also be granted to restrain an apprehended or threatened injury where such injury is certain or very imminent, or mischief of an overwhelming nature is likely to be done (*s*). If the thing sought to be prohibited is in itself a nuisance (*t*), or, although not in itself a nuisance, will manifestly end in such a nuisance as the court restrains (*a*), the court will interfere; but where the mischief sought to be restrained is not unavoidably and in itself noxious, but only something which may prove to be so, an interlocutory injunction will not be granted (*b*). The court never grants an injunction on the principle that it will do the defendant no harm if he does not intend to commit the act in question (*c*).

Primâ facie case should be shown.

482. Where the plaintiff is asserting a legal right, he should show, at least, a strong *primâ facie* case in support of the right which he asserts (*d*), but the mere fact that there is a doubt as to the existence of such legal right is not sufficient to prevent the court from granting an injunction, although it is a matter for serious attention (*e*). Where the application is to restrain the exercise of an alleged legal right, the plaintiff should show that there are substantial grounds for doubting the existence of such legal right (*f*).

Irreparable injury.

483. The plaintiff must also as a rule (*g*) be able to show that an injunction until the hearing is necessary to protect him against

(*s*) *Ripon (Earl)* v. *Hobart* (1834), 3 My. & K. 169; *Hepburn* v. *Lordan* (1865), 2 Hem. & M. 345; and see *Crosse* v. *Duckers* (1873), 27 L. T. 816. In matters of great importance which can only be properly determined at the hearing, the court is in favour of restraining destructive operations until the hearing (*A.-G.* v. *Great Eastern Rail. Co.* (1872), 25 L. T. 867); and see p. 209, *ante*, and title EQUITY, Vol. XIII., pp. 51, 52, for the principle upon which the court acts in *quia timet* actions.

(*t*) *Ripon (Earl)* v. *Hobart, supra*; and see *Hepburn* v. *Lordan, supra*. As to nuisances generally, see title NUISANCE.

(*a*) *Haines* v. *Taylor* (1846), 10 Beav. 75; and see *Crowder* v. *Tinkler* (1816), 19 Ves. 617.

(*b*) *Ripon (Earl)* v. *Hobart, supra*; *Haines* v. *Taylor, supra*.

(*c*) *Coffin* v. *Coffin* (1821), Jac. 70, 72; and see note (*k*), p. 209, *ante*.

(*d*) *Hilton* v. *Granville (Earl)* (1841), Cr. & Ph. 283; *Peru Republic* v. *Dreyfus Brothers & Co.* (1888), 38 Ch. D. 348, 362.

(*e*) *Ollendorff* v. *Black* (1850), 4 De G. & Sm. 209, 211; and see *Electric Telegraph Co.* v. *Nott* (1847), 11 Jur. 157 (where the injunction was refused).

(*f*) *Sparrow* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1851), 9 Hare, 436, 441; affirmed (1852), 2 De G. M. & G. 94, C. A. It requires a very strong case indeed to induce the court to interfere with an admitted legal right upon an alleged equity (*Playfair* v. *Birmingham, Bristol and Thames Junction Rail. Co.* (1840), 9 L. J. (CH.) 253). On a motion for an injunction in a matter merely pecuniary, the applicant must be able to satisfy the court, not only that there is a case to be tried, but also that there is some probability of his succeeding at the trial (*A.-G.* v. *Wigan Corporation* (1854), 5 De G. M. & G. 52, C. A.). The court may also decline to interfere in a case of this kind, when there is no dispute as to the competency of the defendants to pay any debts for which they are liable (*South Yorkshire Railway and River Dun Co.* v. *Great Northern Rail. Co.* (1853), 1 W. R. 203, C. A.).

(*g*) See p. 238, *post*, for cases where the injunction is sought to restrain a breach of an express negative covenant or agreement.

irreparable injury (*h*); mere inconvenience is not enough (*i*). By the term "irreparable injury" is meant, substantially, injury which could never be adequately remedied or atoned for by damages (*k*).

An injunction may, however, be granted even where the injury is capable of compensation in damages, if the act in respect of which relief is sought is likely to destroy the subject-matter in question (*l*); and the mere fact that a party has, in order to avoid litigation, offered to take a sum of money as the price of his rights does not preclude him from asserting that he will suffer irreparable damage from the continuance of the act complained of (*m*). But, if the plaintiff has himself shown, by his conduct on a previous occasion, that the injury complained of is one which may in some way be compensated by money, the court may decline to grant an injunction (*n*).

SUB-SECT. 2.—*Effect of Conduct of Parties.*

Conduct of parties considered.

484. In considering whether an interlocutory injunction should be granted, the court has regard to the conduct and dealings of the parties before application was made to the court by the plaintiff to preserve and protect his right (*o*), since the jurisdiction to interfere, being purely equitable, is governed by equitable principles (*p*).

Acquiescence.

Thus, acquiescence by the plaintiff may prevent the granting of an injunction (*q*), especially when the defendant has incurred expenditure in the meantime (*r*). This principle is peculiarly

(*h*) *A.-G.* v. *Hallett* (1847), 16 M. & W. 569; *Ripon* (*Earl*) v. *Hobart* (1834), 3 My. & K. 169, 174; *Southampton* (*Lord*) v. *Birmingham Rail. Co.* (1838), 2 Jur. 1012; *Hilton* v. *Granville* (*Earl*) (1841), Cr. & Ph. 283; *North Union Rail. Co.* v. *Bolton and Preston Rail. Co.* (1843), 3 Ry. & Can. Cas. 345; *Shrewsbury and Birmingham Rail. Co.* v. *London and North Western Rail. Co.* (1850), 3 Mac. & G. 70; *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, C. A.; *Johnson* v. *Shrewsbury and Birmingham Rail. Co.* (1853), 3 De G. M. & G. 914, 931, C. A.; *Dyke* v. *Taylor* (1861), 3 De G. F. & J. 467, C. A.

(*i*) *Dyke* v. *Taylor*, *supra*.

(*k*) *A.-G.* v. *Hallett*, *supra*, at p. 581; *East Lancashire Rail. Co.* v. *Hattersley* (1849), 8 Hare, 72, 90; and see *Cory* v. *Yarmouth and Norwich Rail. Co.* (1844), 3 Hare, 593, 603, 604; *Wood* v. *Sutcliffe* (1851), 2 Sim. (N. S.) 163, 165; *A.-G.* v. *Sheffield Gas Consumers Co.*, *supra*, at p. 320; *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 5 De G. M. & G. 851, 860, C. A.; *Bloxam* v. *Metropolitan Rail. Co.* (1868), 3 Ch. App. 337, 354.

(*l*) *Hilton* v. *Granville* (*Earl*), *supra*, at p. 292.

(*m*) *Ainsworth* v. *Bentley* (1866), 14 W. R. 630.

(*n*) *Wood* v. *Sutcliffe*, *supra*, at p. 169; *Dowling* v. *Betjemann* (1862), 2 John. & H. 544, 553; *Ormerod* v. *Todmorden Mill Co.* (1883), 11 Q. B. D. 155, 162, C. A.

(*o*) *Blakemore* v. *Glamorganshire Canal Navigation* (1832), 1 My. & K. 154, 168; and see *Williams* v. *Roberts* (1850), 8 Hare, 315, 327; *Ward* v. *Higgs* (1864), 12 W. R. 1074.

(*p*) *Great Western Rail. Co.* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1853), 3 De G. M. & G. 341, 359, C. A.; and see *Jarvis* v. *Islington Borough Council* (1909), 73 J. P. Journal, 323; title EQUITY, Vol. XIII., pp. 46 *et seq.*, 166 *et seq.*

(*q*) See *Clover* v. *Royden* (1873), L. R. 17 Eq. 190, 204.

(*r*) *Birmingham Canal Co.* v. *Lloyd* (1812), 18 Ves. 515; *Crook* v. *Wilson* (1855), 3 W. R. 378; *Crossley* v. *Derby Gas Light Co.* (1834), 1 Web. Pat. Cas. 119, 120; *Great Western Rail. Co.* v. *Oxford, Worcester and Wolverhampton Rail. Co.*, *supra*, at pp. 359, 361; *Rochdale Canal Co.* v. *King* (1851), 2 Sim. (N. S.) 78, 88. The weight to be attached to the length of time which has elapsed must in a great degree depend upon the amount of the expenditure (*Great*

SECT. 2. Interlocutory Injunction.

applicable in the case of a mining property (*a*), and where the granting of an injunction would involve the stopping of the defendant's works (*b*).

Assertion of claim.

The mere notice of a claim (*c*), or even the continual assertion of a claim (*d*), unaccompanied by any act to give effect to it, will not keep alive a right which would otherwise be precluded; but if a defendant has acted with full knowledge of the plaintiff's rights (*e*), or has incurred expenditure under full notice that the work was objected to and that steps would be taken to put a stop to it (*f*), he will not be entitled to rely upon the acquiescence of the plaintiff.

When acquiescence is no bar.

Acquiescence is no bar if it can be satisfactorily accounted for (*g*), as, for example, where the plaintiff has assumed that the defendant, having the right to do a thing, would not use his right so as to injure him and his assumption is justifiable (*h*), or has acquiesced in what he has been led to consider was merely a temporary violation of his right (*i*), or has endeavoured to come to an amicable arrangement with the defendant (*k*), or where the defendant has falsely represented to the plaintiff that the injury complained of would not result from his operations (*l*), or has led him to believe that the evil would be remedied (*m*). Nor will the plaintiff be deemed to have acquiesced in the claims of others, unless he was fully cognisant of his right to dispute them (*n*), nor where he has assented to the act complained of under an erroneous opinion and view and in ignorance of the consequences (*o*). The fact that the plaintiff has acquiesced in a state of things while it produced little injury to him does not constitute such

Western Rail. Co. v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1853), 3 De G. M. & G. 341, 361, C. A.).

(*a*) *Ernest* v. *Vivian* (1863), 33 L. J. (CH.) 513, 517; and see *Clegg* v. *Edmondson* (1857), 8 De G. M. & G. 787, C. A.

(*b*) *Greenhalgh* v. *Manchester and Birmingham Rail. Co.* (1838), 3 My. & Cr. 784, 798, 799.

(*c*) *Wicks* v. *Hunt* (1859), John. 372; *Ernest* v. *Vivian, supra.*

(*d*) *Clegg* v. *Edmondson, supra; Lehmann* v. *McArthur* (1868), 3 Ch. App. 496, 504.

(*e*) *Ramsden* v. *Dyson* (1866), L. R. 1 H. L. 129, 141; *Russell* v. *Watts* (1883), 25 Ch. D. 559, 576, C. A.; reversed (1885), 10 App. Cas. 590; *Proctor* v. *Bennis* (1887), 36 Ch. D. 740, 760, C. A.

(*f*) *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, 328, C. A.; *Rochdale Canal Co.* v. *King* (1853), 16 Beav. 630, 643; *Manners (Lord)* v. *Johnson* (1875), 1 Ch. D. 673.

(*g*) *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349; *Lehmann* v. *McArthur, supra,* at p. 504; *A.-G.* v. *Halifax Corporation* (1869), 17 W. R. 1088; *Coles* v. *Sims* (1854), 5 De G. M. & G. 1, C. A.

(*h*) *A.-G.* v. *Halifax Corporation, supra; A.-G.* v. *Leeds Corporation* (1870), 5 Ch. App. 583; *Smith* v. *Smith* (1875), L. R. 20 Eq. 500.

(*i*) *Gordon* v. *Cheltenham and Great Western Union Rail. Co.* (1842), 5 Beav. 229, 238.

(*k*) *Innocent* v. *North Midland Rail. Co.* (1839), 1 Ry. & Can. Cas. 242, 256.

(*l*) *Davies* v. *Marshall* (1861), 10 C. B. (N. S.) 697.

(*m*) *A.-G.* v. *Luton Local Board of Health* (1856), 2 Jur. (N. S.) 180; *A.-G.* v. *Birmingham Corporation* (1858), 4 K. & J. 528.

(*n*) *Greenhalgh* v. *Manchester and Birmingham Rail. Co., supra,* at p. 791; *Marker* v. *Marker* (1851), 9 Hare, 1, 16.

(*o*) *Bankart* v. *Houghton* (1859), 27 Beav. 425, 431.

acquiescence as would debar him from obtaining an interlocutory injunction in the event of the injury being substantially increased (*p*).

Acquiescence on the part of one of several plaintiffs.

The acquiescence on the part of one of several plaintiffs may preclude the interference of the court upon an interlocutory application (*q*). The court will frequently refuse an injunction where it acknowledges the right, if it considers that the conduct of the plaintiff, not only with the party with whom the contest exists, but with others, has led to the state of things which occasions the contest (*r*). The effect of knowledge and acquiescence is the same in the case of a company as in the case of a private individual (*s*).

Delay.

485. A plaintiff must also be able to show that he has not been guilty of improper delay in applying to the court, for delay not amounting to acquiescence may deprive him of the right to an interlocutory injunction (*a*).

SUB-SECT. 3.—*Nature of Order which will be made.*

Court confines itself strictly to the point it is called upon to decide.

486. In dealing with an interlocutory application, the court will confine itself strictly to the point which it is called upon to decide, and will express its opinion on the case only so far as is necessary to show the grounds upon which the interlocutory application is disposed of (*b*), and, in the absence of very special circumstances, will impose only such restraint as will suffice to stop the mischief and keep things as they are until the hearing (*c*).

Balance of convenience considered.

487. Where any doubt exists as to the legal right, or if the legal right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties

(*p*) *Bankart* v. *Houghton* (1859), 27 Beav. 425; *Western* v. *Macdermott* (1866), 2 Ch. App. 72; *A.-G.* v. *Halifax Corporation* (1869), 17 W. R. 1088; and see *Knight* v. *Simmonds*, [1896] 1 Ch. 653; affirmed, [1896] 2 Ch. 294, C. A.

(*q*) *Marker* v. *Marker* (1851), 9 Hare, 1, 15.

(*r*) *Rundell* v. *Murray* (1821), Jac. 311, 316; *Saunders* v. *Smith* (1838), 3 My. & Cr. 711, 730; and see *Rochdale Canal Co.* v. *King* (1851), 2 Sim. (N. S.) 78, 87.

(*s*) *Laird* v. *Birkenhead Rail. Co.* (1859), John. 500; *Hill* v. *South Staffordshire Rail. Co.* (1865), 11 Jur. (N. S.) 192.

(*a*) *Hilton* v. *Granville* (*Earl*) (1841), Cr. & Ph. 283, 292; *South-Eastern Rail. Co.* v. *Martin* (1848), 18 L. J. (CH.) 103; *Bridson* v. *Benecke* (1849), 12 Beav. 1; *M'Lure* v. *Ripley* (1850), 2 Mac. & G. 274, 276, n.; *Rochdale Canal Co.* v. *King*, *supra*, at pp. 89, 90; *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, 324, C. A.; *Great Western Rail. Co.* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1853), 3 De G. M. & G. 341, *per* KNIGHT BRUCE, L.J., at p. 353; *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212, 230; *Bovill* v. *Crate* (1865), L. R. 1 Eq. 388; *Salisbury* v. *Metropolitan Rail. Co.* (1870), 39 L. J. (CH.) 429; *Isaacson* v. *Thompson* (1871), 41 L. J. (CH.) 101; *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1885), 15 Q. B. D. 476, 486; and see *Turner* v. *Mirfield* (1865), 34 Beav. 390, *per* ROMILLY, M.R., at p. 391; *Folkestone Corporation* v. *Woodward* (1872), L. R. 15 Eq. 159; title EQUITY, Vol. XIII., pp. 171, 172.

(*b*) *Skinners' Co.* v. *Irish Society* (1836), 1 My. & Cr. 162, 164.

(*c*) *Blakemore* v. *Glamorganshire Canal Navigation* (1832), 1 My. & K. 154, 185. Even before the Judicature Acts a perpetual injunction could be granted without

SECT. 2. Interlocutory Injunction.

and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right (*d*). The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff (*e*).

Terms may be imposed as a condition of granting,

The court will take care that the order is so framed that neither party will be deprived of the benefit he is entitled to, if in the event it turns out that the party in whose favour it was made is in the wrong (*f*); and for this purpose it will, if necessary, impose terms upon the plaintiff as a condition of granting the injunction (*g*). The party applying for an interlocutory injunction must always give an undertaking in damages, in case it should turn out at the hearing that he is in the wrong (*h*). He may also be required to undertake to prosecute the action with due diligence (*i*), or, if the action has reference to the payment of money, to pay the amount in dispute into court (*k*). Similarly also the court may impose terms upon the defendant as a condition of withholding the injunction (*l*). Thus he may be required to undertake to keep an

or withholding the injunction.

the plaintiff being required first to establish his right at law in special circumstances; see pp. 202, 206, *ante*.

(*d*) *Ripon* (*Earl*) v. *Hobart* (1834), 3 My. & K. 169; *Bramwell* v. *Halcomb* (1836), 3 My. & Cr. 737; *Saunders* v. *Smith* (1838), 3 My. & Cr. 711, 737; *Sweet* v. *Shaw* (1839), 8 L. J. (CH.) 216; *Dickens* v. *Lee* (1844), 8 Jur. 183, 185; *Hilton* v. *Granville* (*Earl*) (1841), Cr. & Ph. 283, 297; *Clowes* v. *Beck* (1851), 13 Beav. 347; *Hodgson* v. *Powis* (*Earl*) (1851), 1 De G. M. & G. 6, 13, C. A.; *Child* v. *Douglas* (1854), 5 De G. M. & G. 739, 741, C. A.; *Norman* v. *Mitchell* (1854), 5 De G. M. & G. 648, 673, C. A.; *Munro* v. *Wivenhoe and Brightlingsea Rail. Co.* (1865), 4 De G. J. & Sm. 723, 733, C. A.; *Elmhirst* v. *Spencer* (1849), 2 Mac. & G. 45, 51; *Cork Corporation* v. *Rooney* (1881), 7 L. R. Ir. 191; *Lee* v. *Gibbings* (1892), 67 L. T. 263. On this principle injunctions were refused in *Greenhalgh* v. *Manchester and Birmingham Rail. Co.* (1838), 3 My. & Cr. 784, 799; *Hilton* v. *Granville* (*Earl*), *supra*; *Cory* v. *Yarmouth and Norwich Rail. Co.* (1844), 3 Hare, 593, 603; *M'Neill* v. *Williams* (1847), 11 Jur. 344; *William* v. *Heath* (1860), 1 L. T. 267; *Salisbury* v. *Metropolitan Rail. Co.* (1870), 39 L. J. (CH.) 429, 434; *Wells* v. *Attenborough* (1871), 24 L. T. 312; *Elwes* v. *Payne* (1879), 12 Ch. D. 468, C. A.; *Fielden* v. *Lancashire and Yorkshire Rail. Co.* (1848), 2 De G. & Sm. 531, 536; *Mitchell* v. *Henry* (1880), 15 Ch. D. 181, C. A.; *A.-G.* v. *Acton Local Board* (1882), 22 Ch. D. 221; *Arnott* v. *Whitby Urban District Council* (1909), 101 L. T. 14; and granted in *Plimpton* v. *Spiller* (1876), 4 Ch. D. 286, C. A.; *Cork Corporation* v. *Rooney*, *supra*; *Newson* v. *Pender* (1884), 27 Ch. D. 43, C. A.

(*e*) *Child* v. *Douglas*, *supra*, at pp. 741, 742.

(*f*) *East Lancashire Rail. Co.* v. *Hattersley* (1849), 8 Hare, 72, 94.

(*g*) *Boardman* v. *Mostyn* (1801), 6 Ves. 467, 471; *Sanxter* v. *Foster* (1841), Cr. & Ph. 302; *Rigby* v. *Great Western Rail. Co.* (1846), 2 Ph. 44, 50; *East Lancashire Rail. Co.* v. *Hattersley*, *supra*; see *Coleman* v. *West Hartlepool Rail. Co.* (1861), 3 L. T. 847.

(*h*) As to the undertaking in damages, see p. 284, *post*.

(*i*) *Newson* v. *Pender*, *supra*, at p. 63; and see *Sweet* v. *Cater* (1841), 11 Sim. 572; *Dickens* v. *Lee*, *supra*; *Bohn* v. *Bogue* (1846), 10 Jur. 420 (where the plaintiff was required to undertake to try his right at law).

(*k*) *Whitworth* v. *Rhodes* (1850), 20 L. J. (CH.) 105; *Shaw* v. *Jersey* (*Earl*) (1879), 4 C. P. D. 359, C. A.; and see *Jones* v. *Pacaya Rubber and Produce Co., Ltd.*, [1911] 1 K. B. 455, C. A.

(*l*) *Rigby* v. *Great Western Rail. Co.* (1846), 2 Ph. 44, 50; *Cromford and High*

account, and in the event of the plaintiff establishing his case to pay such sum as the court shall direct (*m*), or to give reasonable notice of his intention to build and to produce plans (*n*), or not to do or continue the act complained of in the meantime (*o*), or to abide by any order the court may make as to damages (*p*) or as to pulling down the structure complained of (*q*), or to make certain admissions for the purposes of the trial (*r*).

When motion not allowed to stand over till trial.

488. Where it is impossible to form any opinion as to whether or not the act complained of will be a nuisance, the motion will not be allowed to stand over till the act in question has been so far executed that its character may be judged, but will be refused at once (*s*).

Mandatory injunction.

489. A mandatory injunction can be granted on an interlocutory application as well as at the hearing (*a*), but, in the absence of special circumstances, it will not be granted on motion (*b*). If, however, the case is clear and one which the court thinks ought to

Peak Rail. Co. v. *Stockport, Disley, and Whaley Bridge Rail. Co.* (1857), 1 De G. & J. 326, C. A.; *Low* v. *Innes* (1864), 4 De G. J. & Sm. 286; *Elwes* v. *Payne* (1879), 12 Ch. D. 468, C. A.; *Mitchell* v. *Henry* (1880), 15 Ch. D. 181, C. A.; *Wall* v. *London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.; *Smith* v. *Baxter*, [1900] 2 Ch. 138, 148. Sometimes the injunction is suspended or stands over for a time to enable the defendants to carry out their undertaking; see *Spencer* v. *London and Birmingham Rail. Co.* (1836), 1 Ry. & Can. Cas. 159, 172; *Northam Bridge and Roads Co.* (*Proprietors*) v. *London and Southampton Rail. Co.* (1840), 1 Ry. & Can. Cas. 653, 683; *A.-G.* v. *Eastern Counties Rail. Co.* (1843), 3 Ry. & Can. Cas. 337, 344.

(*m*) *Rigby* v. *Great Western Rail. Co.* (1846), 2 Ph. 44, 50; and see *Jones* v. *Great Western Rail. Co.* (1840), 1 Ry. & Can. Cas. 684, 695. Where the act complained of involves the making of profits, an undertaking by the defendant to keep an account is almost invariably required; see *Bramwell* v. *Halcomb* (1836), 3 My. & Cr. 737; *Cory* v. *Yarmouth and Norwich Rail. Co.* (1844), 3 Hare, 593, 604; *Rigby* v. *Great Western Rail. Co., supra*; *M'Neill* v. *Williams* (1847), 11 Jur. 344; *Swallow* v. *Wallingford and Day* (1848), 12 Jur. 403; *East Lancashire Rail. Co.* v. *Hattersley* (1849), 8 Hare, 72; *Elwes* v. *Payne, supra*; *Mitchell* v. *Henry, supra*.

(*n*) *Smith* v. *Baxter, supra*.

(*o*) *Clarke* v. *Clark* (1864), 13 W. R. 133; and see *Wall* v. *London and Northern Assets Corporation, supra*.

(*p*) *M'Neill* v. *Williams, supra*; *A.-G.* v. *Manchester and Leeds Rail. Co.* (1838), 1 Ry. & Can. Cas. 436, 452.

(*q*) *Ford* v. *Gye* (1858), 6 W. R. 235.

(*r*) *Hilton* v. *Granville* (*Earl*) (1841), Cr. & Ph. 283. Before the Judicature Acts, where an injunction was granted, but the plaintiff was required to undertake to try his right at law, the defendant might be ordered to make certain admissions for the purpose of the trial (*Sweet* v. *Cater* (1841), 11 Sim. 572; *Dickens* v. *Lee* (1844), 8 Jur. 183; *Bohn* v. *Bogue* (1846), 10 Jur. 420).

(*s*) *Haines* v. *Taylor* (1847), 2 Ph. 209. As to appeals from such an order, see p. 283, *post*.

(*a*) *Robinson* v. *Byron* (*Lord*) (1785), 1 Bro. C. C. 588; *Lane* v. *Newdigate* (1804), 10 Ves. 192; *Hervey* v. *Smith* (1855), 1 K. & J. 389; *Bonner* v. *Great Western Rail. Co.* (1883), 24 Ch. D. 1, 10, C. A.; *Cohen* v. *Poland*, [1887] W. N. 159; and see *A.-G.* v. *Metropolitan Board of Works* (1863), 1 Hem. & M. 298, 312, 321.

(*b*) *Blakemore* v. *Glamorganshire Canal Navigation* (1832), 1 My. & K. 154; *Gale* v. *Abbot* (1862), 8 Jur. (N. S.) 987; *Johnston* v. *Royal Courts of Justice Chambers Co.*, [1883] W. N. 5, C. A.; and see *Anon.* (1790), 1 Ves. 140.

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be decided at once (*c*), or if the act done is a simple and summary one which can be easily remedied (*d*), or if the defendant, after express notice, has committed a clear violation of an express contract (*e*), or where the defendant, on receipt of notice that an injunction is about to be applied for, hurries on the work in respect of which complaint is made, so that, when he receives notice of an interim injunction, it is completed (*f*), a mandatory injunction will be granted on an interlocutory application.

Part III.—Parties against whom an Injunction may be Granted.

SECT. 1.—*In General.*

In general.

490. In general, if a proper case is made out for the exercise by the court of its jurisdiction, any person against whom a right of action exists can be restrained by injunction (*g*).

SECT. 2.—*Corporations.*

SUB-SECT. 1.—*In General.*

Jurisdiction in general.

491. Companies incorporated under the Companies (Consolidation) Act, 1908 (*h*), which infringe the legal rights of others, are amenable to the jurisdiction of the court by way of injunction in exactly the same way as individuals. So, too, are public functionaries and companies incorporated by statute for public purposes, although the court will not interfere with what they do so long as they keep strictly within the limits of the powers and duties entrusted to them by the legislature (*i*).

(*c*) *Allport* v. *Securities Corporation* (1895), 64 L. J. (CH.) 491.

(*d*) *Hervey* v. *Smith* (1855), 1 K. & J. 389.

(*e*) *Morris* v. *Grant* (1875), 24 W. R. 55.

(*f*) *Daniel* v. *Ferguson*, [1891] 2 Ch. 27, C. A., followed in *Von Joel* v. *Hornsey*, [1895] 2 Ch. 774, C. A. (where the defendant, knowing that the plaintiff was endeavouring to serve a writ, evaded service for some days and meantime hurried on his buildings).

(*g*) As to injunctions against a Government department, see p. 205, *ante*. As to injunctions against infants, see title INFANTS AND CHILDREN, pp. 143, 144, *ante*.

(*h*) 8 Edw. 7, c. 69. As to the law relating to companies generally, see title COMPANIES, Vol. V., pp. 1 *et seq.*

(*i*) *Frewin* v. *Lewis* (1838), 4 My. & Cr. 249, 254; *Liverpool Corporation* v. *Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852, 860, C. A.; *Tinkler* v. *Wandsworth District Board of Works* (1858), 2 De G. & J. 261, 274, C. A.; *Cardiff Corporation* v. *Cardiff Waterworks Co.* (1859), 4 De G. & J. 596, C. A., explained in *Marriott* v. *East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70, 78; *A.-G.* v. *Mid Kent and South-Eastern Rail. Co.* (1867), 3 Ch. App. 100; *A.-G.* v. *Rathmines and Rathgar Township Improvement Commissioners* (1880), 5 L. R. Ir. 114; see further, pp. 227 *et seq.*, *post*.

SECT. 2. Corporations.

Restraining companies from carrying on business in a manner calculated to deceive.

492. The principles applicable to individuals trading under identical or similar names (*k*) apply equally to companies (*l*), and in a proper case a company will be restrained from using a style or name which is calculated to deceive (*m*).

Common law corporations.

493. The jurisdiction of the court to interfere with the application of the property of a common law corporation is dependent upon the question whether or not the property is affected by a trust (*n*). If a trust can be shown the court will interfere by way of injunction to prevent a breach of the trust (*o*), whether the corporation is lay or ecclesiastical (*p*). The burden of proof lies upon the party seeking to establish the trust (*q*).

Municipal corporations.

494. There is nothing in the Municipal Corporations Act, 1882 (*a*), to exclude the ordinary jurisdiction of the court to prevent breaches of trust, and consequently a municipal corporation may be restrained from applying its borough funds for purposes (*b*), or from dealing with its corporate property in a manner (*c*), not authorised by that or some similar statute (*d*). The court has also jurisdiction to restrain a municipal corporation from making a new, or additional, rate if a proper case for the exercise of that jurisdiction be made out (*e*).

(*k*) See generally, title TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*l*) *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank* (1878), 9 Ch. D. 560.

(*m*) *Manchester Brewery Co., Ltd.* v. *North Cheshire and Manchester Brewery Co., Ltd.*, [1898] 1 Ch. 539, C. A.; affirmed, [1899] A. C. 83; *La Société Anonyme des Anciens Établissements Panhard et Levassor* v. *Panhard Levassor Motor Co., Ltd.*, [1901] 2 Ch. 513. See title COMPANIES, Vol. V., p. 84.

(*n*) *A.-G.* v. *Dublin Corporation* (1827), 1 Bli. (N. S.) 312, H. L.; *Parr* v. *A.-G.* (1842), 8 Cl. & Fin. 409, H. L.; *A.-G.* v. *Avon Corporation, otherwise Aberavon* (1863), 3 De G. J. & Sm. 637, C. A.; *A.-G.* v. *Cashel Corporation* (1843), 3 Dr. & War. 294, 314; *Evan* v. *Avon Corporation* (1860), 29 Beav. 144, 151. See also title CORPORATIONS, Vol. VIII., p. 373.

(*o*) *A.-G.* v. *Avon Corporation, otherwise Aberavon, supra*, at p. 651; *A.-G.* v. *St. John's Hospital, Bedford* (1865), 2 De G. J. & Sm. 621, C. A.

(*p*) *A.-G.* v. *St. John's Hospital, Bedford, supra.*

(*q*) *Evan* v. *Avon Corporation, supra;* since *primâ facie* a corporation has full power to dispose of all its property like a private individual (*ibid.*, at p. 149); *A.-G.* v. *St. John's Hospital, Bedford, supra*, at p. 635; *Re Patent File Co., Ex parte Birmingham Banking Co.* (1870), 6 Ch. App. 83, 87.

(*a*) 45 & 46 Vict. c. 50.

(*b*) *A.-G.* v. *Aspinall* (1837), 2 My. & Cr. 613; *A.-G.* v. *Wilson* (1840), Cr. & Ph. 1; *Parr* v. *A.-G.* (1842), 8 Cl. & Fin. 409, H. L.; *A.-G.* v. *Lichfield Corporation* (1848), 11 Beav. 120; *A.-G.* v. *Newcastle-upon-Tyne Corporation and North Eastern Rail. Co.* (1889), 23 Q. B. D. 492, C. A.; affirmed, [1892] A. C. 568; *Tynemouth Corporation* v. *A.-G.*, [1899] A. C. 293; *A.-G.* v. *West Ham Corporation*, [1910] 2 Ch. 560; and see *A.-G.* v. *Norwich Corporation* (1837), 2 My. & Cr. 406.

(*c*) *A.-G.* v. *Great Yarmouth Corporation* (1855), 21 Beav. 625; and see *Armitstead* v. *Durham* (1848), 11 Beav. 556.

(*d*) See generally, title LOCAL GOVERNMENT.

(*e*) *A.-G.* v. *Lichfield Corporation, supra*, at pp. 131, 132; *A.-G.* v. *Newcastle-upon-Tyne Corporation and North Eastern Rail. Co., supra;* and see *A.-G.* v. *Tottenham Urban District Council* (1909), 73 J. P. 437; but the proper course of procedure, where a municipal corporation is raising an illegal rate, is to apply to quash the rate under the provisions of the Municipal Corporations

SECT. 2. Corporations.

Company incorporated by royal charter.

495. An injunction may also be granted at the suit of a member of a company incorporated by royal charter to prevent the company from taking a step which might occasion a forfeiture of its charter (*f*).

Poor law guardians.

496. The High Court has jurisdiction to restrain poor law guardians from applying the poor rates improperly (*g*).

Eleemosynary corporations.

497. In the case of an eleemosynary corporation established by charter or statute, the court has no jurisdiction to interfere with the persons having control of the charity, unless they are committing breaches of trusts in relation to the property of the charity (*h*); but where such a case is established, the court will compel the due performance of the trust, notwithstanding that there is a general or special visitor (*i*). Where the persons having control of the funds or property of the charity are also visitors, they are, so far as there is a trust, likewise subject to the jurisdiction of the court (*k*).

Ecclesiastical corporations.

So also in the case of an ecclesiastical corporation, the court has no jurisdiction over the visitorial powers unless it finds a trust of property (*l*), but, if once it finds a trust, it can interfere, whether or not there is a visitor (*m*).

Corporations sole.

Pending a suit to determine the right to nominate to a benefice (*n*), or where the election of a vicar is declared void and a new election is directed (*o*), the bishop may be restrained from presenting in the meantime. If a person is improperly appointed to a benefice, the court can restrain the bishop from instituting the person so appointed (*p*), and in a proper case a bishop can be restrained

Act, 1882 (45 & 46 Vict. c. 50), or to appeal by *certiorari* to the King's Bench Division under *ibid.*, s. 141 (*A.-G.* v. *Wigan Corporation* (1854), Kay, 268).

(*f*) *Rendall* v. *Crystal Palace Co.* (1858), 4 K. & J. 326. In *Ward* v. *Attorneys' Society* (1844), 1 Coll. 370, a company incorporated by royal charter was restrained on motion, until the hearing, from surrendering its charter with a view to obtaining a new charter with an object different from that for which the original charter was granted; compare title CORPORATIONS, Vol. VIII., pp. 397, 398.

(*g*) *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516, C. A.; but the court will be very careful in granting injunctions relating to poor law relief, having regard to the large power vested in the Local Government Board of authorising the allowance of an unlawful and properly disallowed expense (*ibid.*, at p. 546). See generally, titles POOR LAW; RATES AND RATING.

(*h*) *A.-G.* v. *Foundling Hospital* (*Governors*) (1793), 2 Ves. 41; *Ex parte Berkhampstead Free School* (1813), 2 Ves. & B. 134, 138; *Thomson* v. *London University* (1864), 33 L. J. (CH.) 625; and see generally, title CHARITIES, Vol. IV., pp. 101 *et seq.*

(*i*) *A.-G.* v. *St. Cross Hospital* (1853), 17 Beav. 435; *Daugars* v. *Rivaz* (1860), 28 Beav. 233; and see *A.-G.* v. *Compton* (1842), 1 Y. & C. Ch. Cas. 417.

(*k*) *A.-G.* v. *Lock* (1744), 3 Atk. 164; *A.-G.* v. *Smythies* (1836), 2 My. & Cr. 135

(*l*) *Whiston* v. *Rochester* (*Dean and Chapter*) (1849), 7 Hare, 532.

(*m*) *Ibid.*, at pp. 557, 560.

(*n*) *Nicholson* v. *Knapp* (1838) 9 Sim. 326; *A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch. Cas. 139; and see title ECCLESIASTICAL LAW, Vol. XI., pp. 586, 602.

(*o*) *Edenborough* v. *Canterbury* (*Archbishop*) (1826), 2 Russ. 93, 110, 111.

(*p*) *A.-G.* v. *Litchfield* (*Bishop*) (1801), 5 Ves. 825; and see *A.-G.* v. *Powis* (*Earl*), (1853), Kay, 186.

from interfering with a vicar in the enjoyment of his preferment (*q*).

An injunction cannot be granted by the High Court to restrain persons who have presented a petition to the diocesan court from doing that which, if they obtain a faculty, they will be entitled to do (*r*).

SUB-SECT. 2.—*Corporations for Public Purposes.*

Public companies.

498. A company incorporated by statute is a corporation for those purposes only for which it has been established by Parliament, and whatever it does beyond the scope of such purposes is *ultra vires* and void (*s*), and may be restrained by injunction (*t*). In such cases the court acts on the principle that it is contrary to public policy that a company, authorised by statute to raise a large capital for one specific purpose, should employ that capital in competition with the general public upon speculations of a different kind (*a*).

Who should sue.

499. Proceedings for such an injunction should, where the public interest is concerned, be by the Attorney-General (*b*), but,

(*q*) *Sweet* v. *Ely* (*Bishop*), [1902] 2 Ch. 508, 516.

(*r*) *Proud* v. *Price* (1893), 63 L. J. (Q. B.) 61, 67, C. A. See also title ECCLESIASTICAL LAW, Vol. XI., pp. 512 *et seq.*

(*s*) *Rochdale Canal Co.* v. *Radcliffe* (1852), 18 Q. B. 287; *National Guaranteed Manure Co.* v. *Donald* (1859), 4 H. & N. 8, 16; *Stockport District Waterworks Co.* v. *Manchester Corporation* (1862), 9 Jur. (N. S.) 266; and see title CORPORATIONS, Vol. VIII., p. 359.

(*t*) *A.-G.* v. *Great Northern Rail. Co.* (1860), 1 Drew. & Sm. 154 (where a railway company was restrained from carrying on the business of coal merchants); *Lyde* v. *Eastern Bengal Rail. Co.* (1866), 36 Beav. 10, 14 (a railway company cannot become a steamboat company or carry on a brewery or the like); *Great Western Rail. Co.* v. *Metropolitan Rail. Co.* (1863), 32 L. J. (CH.) 382, *per* WOOD, V.-C., at p. 386 (a company would be restrained from purchasing shares in another company); *A.-G.* v. *Waterford Corporation* (1875), 9 I. R. Eq. 522, C. A. (corporation restrained from applying money produced by rates and funds under their control towards the expenses of introducing a bill into Parliament); *London County Council* v. *A.-G.*, [1902] A. C. 165 (where a company having statutory powers to purchase and work a tramway company was restrained from working omnibuses in connection with the tramways); *A.-G.* v. *Mersey Railway*, [1907] A. C. 415 (where a railway company was restrained from running omnibuses); *A.-G.* v. *West Gloucestershire Water Co.*, [1909] 2 Ch. 338, C. A. (where a water company was restrained from supplying water outside its statutory limits); but see *Ryde Commissioners* v. *Isle of Wight Ferry Co.* (1862), 30 Beav. 616 (where, on a motion for an injunction against the company, it appearing that the act complained of, so far from producing any injury, would be a public convenience, the court declined to interfere). Things which are incidental to and may reasonably and properly be done under the main purpose, though they are not literally within it, would not, however, be prohibited (*A.-G.* v. *Great Eastern Rail. Co.* (1880), 5 App. Cas. 473, *per* Lord BLACKBURN, at p. 481; *London and North Western Rail. Co.* v. *Price* (1883), 11 Q. B. D. 485, 489; *Stagg* v. *Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169, C. A.; *Peel* v. *London and North Western Railway*, [1907] 1 Ch. 5, C. A.; *Re Kingsbury Collieries, Ltd. and Moore's Contract*, [1907] 2 Ch. 259). See generally, on the subject of injunctions against companies in respect of acts *ultra vires*, title COMPANIES, Vol. V., pp. 285—288.

(*a*) *A.-G.* v. *Great Northern Rail. Co. supra*, at p. 161; *Hare* v. *London and North-Western Rail. Co.* (1861), 2 John. & H. 80, 109.

(*b*) *A.-G.* v. *Great Northern Rail. Co., supra*, at p. 161. A rival company is not qualified to represent the rights and interests of the public (*Stockport District Waterworks Co.* v. *Manchester Corporation* (1862), 9 Jur. (N. S.) 266;

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where the act in question is one which involves an injury to private interests, an individual can sue without joining the Attorney-General (*c*), and may obtain an injunction if he can show special damage (*d*). The question whether or not the Attorney-General should sue on behalf of the relators is a matter for him, and not for the courts, to decide. His jurisdiction in this respect is absolute (*e*), but the court has a discretion in these as in other cases of injunction, and the Attorney-General is not entitled to an injunction as of right on proving his case (*f*).

Attorney-General need not usually show special damage.

500. As a rule, it is not necessary for the Attorney-General to show special damage to the public. It is usually sufficient if he can show that the company has transgressed, or is about to transgress, the powers conceded to it by the legislature (*g*); but the court can refuse to interfere if it is satisfied that the interest of the public does not require its assistance (*h*), or that the act complained of cannot be regarded in the light of a public injury (*i*). In granting

Pudsey Coal Gas Co. v. *Bradford Corporation* (1873), L. R. 15 Eq. 167; *Bonner* v. *Great Western Rail. Co.* (1883), 24 Ch. D. 1, 8, C. A.).

(*c*) *Sampson* v. *Smith* (1838), 8 Sim. 272; *Spencer and Ward* v. *London and Birmingham Rail. Co.* (1836), 7 L. J. (CH.) 281; *A.-G.* v. *Great Northern Rail. Co.* (1860), 1 Drew. & Sm. 154; *Bonner* v. *Great Western Rail. Co.*, *supra*.

(*d*) And see p. 229, *post*.

(*e*) *London County Council* v. *A.-G.*, [1902] A. C. 165; *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34, 44; *A.-G.* v. *Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48, 61, C. A.

(*f*) *A.-G.* v. *Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch. D. 752, 755; *A.-G.* v. *West Gloucestershire Water Co.*, [1909] 2 Ch. 338, 346, C. A.; *A.-G.* v. *London and North Western Railway*, [1900] 1 Q. B. 78, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 87; *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, *supra*, *per* FARWELL, J., at p. 42; *A.-G.* v. *Birmingham, Tame, and Rea District Drainage Board*, *supra*. The difficulty in which an injunction might place public bodies, if compelled to close sewers under their control, but in daily use, has induced the court in many cases not to exercise its jurisdiction by way of injunction unless it is absolutely essential to do so (*A.-G.* v. *Acton Local Board* (1882), 22 Ch. D. 221, 232; *Islington Vestry* v. *Hornsey Urban Council*, [1900] 1 Ch. 695, 707, C. A.).

(*g*) *Liverpool Corporation* v. *Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852, 860, C. A.; *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212, 228; *A.-G.* v. *Great Western Rail. Co.* (1872), 7 Ch. App. 767; *A.-G.* v. *Cockermouth Local Board* (1874), L. R. 18 Eq. 172; *A.-G.* v. *Great Eastern Rail. Co.* (1879), 11 Ch. D. 449, C. A., *per* BAGGALLAY, L.J., at p. 500; *A.-G.* v. *Shrewsbury (Kingsland) Bridge Co.*, *supra*; *Bonner* v. *Great Western Rail. Co.*, *supra*, *per* BAGGALLAY, L.J., at p. 8; *A.-G.* v. *London and North Western Railway*, *supra*; *London County Council* v. *A.-G.*, [1902] A. C. 165; *A.-G.* v. *Mersey Railway*, [1907] A. C. 415; *A.-G.* v. *Frimley and Farnborough District Water Co.*, [1908] 1 Ch. 727, C. A.; *A.-G.* v. *West Gloucestershire Water Co.*, *supra*. The law will be dealt with as it exists, and the possibility of further powers being granted will not be taken into account (*Great Western Rail. Co.* v. *Metropolitan Rail. Co.* (1863), 32 L. J. (CH.) 382). Where the act complained of has been declared by a competent authority to be illegal the court will grant an injunction at the instance of the Attorney-General, without considering the grounds on which it has been declared illegal (*A.-G.* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1854), 2 W. R. 330).

(*h*) *A.-G.* v. *Birmingham and Derby Junction Rail. Co.* (1840), 2 Ry. & Can. Cas. 124, 132.

(*i*) *A.-G.* v. *Birmingham and Oxford Junction Rail. Co.* (1851), 3 Mac. & G. 453; *A.-G.* v. *Great Eastern Rail. Co.* (1879), 11 Ch. D. 449, C. A., *per* JAMES,

an injunction to restrain a public body from continuing a state of things which existed at the time of the commencement of its powers the court looks at the balance of convenience (*k*), but, if the act complained of is expressly forbidden, public convenience will be disregarded (*l*). It is no defence to an action against a public body at the relation of the Attorney-General to restrain a nuisance that the relators have powers which would enable them themselves to remedy the evil (*m*).

Private person must show special damage.

501. When the proceeding is by a private person, he must show special damage to himself (*n*), unless the act prohibited is obviously prohibited for his special protection (*o*). The court will, moreover, take the interest of the public into consideration when asked to interfere with a railway (*p*). A simple contract creditor of a company is not entitled to an injunction to restrain a company from dealing with its assets, on the ground that he will be defrauded thereby (*q*).

SUB-SECT. 3.—*Proceedings against a Company by its Members.*

Action by members of a company in case of individual wrong.

502. If the acts of a company amount to an individual injury or wrong to an individual member of the company, such member will have a right of action against the company, and in a proper case may obtain an injunction against the company in aid of his legal right (*r*). If a company attempts to act *ultra*

L.J., at pp. 484, 485, and see *A.-G.* v. *Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48, C. A.

(*k*) *A.-G.* v. *Dorking Union Guardians* (1882), 20 Ch. D. 595, 607, C. A.

(*l*) *Cromford and High Peak Rail. Co.* v. *Stockport, Disley, and Whaley Bridge Rail. Co.* (1857), 3 Jur. (N. S.) 628.

(*m*) *A.-G.* v. *Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146.

(*n*) *Chamberlaine* v. *Chester and Birkenhead Rail. Co.* (1848), 1 Exch. 870; *Holyoake* v. *Shrewsbury and Birmingham Rail. Co.* (1848), 5 Ry. & Can. Cas. 421; *Liverpool Corporation* v. *Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852, C. A.; *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212; *Stockport District Waterworks Co.* v. *Manchester Corporation* (1862), 9 Jur. (N. S.) 266; *Pudsey Coal Gas Co.* v. *Bradford Corporation* (1873), L. R. 15 Eq. 167; *Nuneaton Local Board* v. *General Sewage Co.* (1875), L. R. 20 Eq. 127; *Bonner* v. *Great Western Rail. Co.* (1883), 24 Ch. D. 1, C. A.; *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242, C. A.; *Marriott* v. *East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70. If an individual has sustained no damage and there is no reason to apprehend that he will do so, he cannot sue, notwithstanding that he is nearer to the possible cause of injury than the rest of the public (*Ware* v. *Regent's Canal Co.*, *supra*., *per* LORD CHELMSFORD, L.C., at p. 228).

(*o*) *Chamberlaine* v. *Chester and Birkenhead Rail. Co.*, *supra*, *per* POLLOCK, C.B., at p. 877; and see also *Cromford and High Peak Rail. Co.* v. *Stockport, Disley, and Whaley Bridge Rail. Co.*, *supra*. For the cases in which injunctions will be granted in connection with the taking and user of land acquired by public companies under their statutory powers, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 24, 25, 74, 97, 101; and p. 234, *post*.

(*p*) *Lyde* v. *Eastern Bengal Rail. Co.* (1866), 36 Beav. 10, 17, and see *Rigby* v. *Great Western Rail Co.* (1846), 2 Ph. 44.

(*q*) *Mills* v. *Northern Railway of Buenos Ayres Co.* (1870), 5 Ch. App. 621.

(*r*) See *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610; *Munster* v. *Cammell Co.* (1882), 21 Ch. D. 183; *Kyshe* v. *Alturas Gold Co.* (1888), 36 W. R. 496; *Turnbull* v. *West Riding Athletic Club* (*Leeds*), *Ltd.*, [1894] W. N. 4 (where on the application of a director injunctions were granted to restrain the

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vires (*s*), any single shareholder has a right to resist it, and the court will interpose on his behalf by way of injunction (*a*). He may sue either in his own name (*b*), or on behalf of himself and all other members of the company holding a common interest with himself in the company (*c*).

Parties.

503. Where one class of shareholders has an interest opposed to that of another class, it is necessary to make the latter class defendants; but where one individual, having an interest, complains of the act of the whole company, there is, as a general rule, no necessity for any other shareholders to be present (*d*). If an agreement be entered into by two companies, an injunction will not be granted to restrain one of such companies from acting under the agreement at the suit of a shareholder of the other company, on the ground that, so far as regards the former company, the agreement is *ultra vires* (*e*).

plaintiff's co-directors from wrongfully excluding him from the board); *Bainbridge* v. *Smith* (1889) 41 Ch. D. 462, C. A.; *Sutton* v. *English and Colonial Produce Co.*, [1902] 2 Ch. 502 (where similar injunctions were refused); *Norman* v. *Mitchell* (1854), 5 De G. M. & G. 648, C. A.; *Johnson* v. *Lyttle's Iron Agency* (1877), 5 Ch. D. 687, C. A.; *Goulton* v. *London Architectural Brick and Tile Co.*, [1877] W. N. 141 (where an injunction was granted to restrain an illegal forfeiture of shares); *Jones* v. *Pacaya Rubber and Produce Co., Ltd.*, [1911] 1 K. B. 455, C. A.; and see *Holland* v. *Dickson* (1888), 37 Ch. D. 669; *Mutter* v. *Eastern and Midlands Rail. Co.* (1888), 38 Ch. D. 92, C. A.; *Nelson* v. *Anglo-American Land Mortgage Agency Co.*, [1897] 1 Ch. 130; *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 708, C. A. (where injunctions were granted to restrain the interference by companies with shareholders and debenture-holders, in the exercise of their statutory rights to inspect, at all reasonable times, the register of mortgages of the company). An injunction will not be granted to restrain the company from making calls on its shares and enforcing them, even when the shareholder has commenced an action to try the question of his liability, for in such an action he can, by resisting payment, get the question of liability settled and so obtain a remedy without having recourse to an injunction (*Tatham* v. *Palace Restaurants, Ltd.* (1909), 53 Sol. Jo. 743); and see the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 45, 63; the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 28, and the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 100, 101, and generally on this subject, title COMPANIES, Vol. V., pp. 289 *et seq.*

(*s*) As to what are *ultra vires* acts, and generally as to the exercise by a company of its powers, see title COMPANIES, Vol. V., pp. 223, 285, 289, 318.

(*a*) *Simpson* v. *Westminster Palace Hotel Co.* (1860), 8 H. L. Cas. 712, 717; and see *Mosely* v. *Koffyfontein Mines, Ltd.*, [1911] 1 Ch. 73, C. A. An injunction will not be granted to restrain a company from doing something within its objects on the ground that it will be thereby incapacitated from doing something else also within its objects (*Syers* v. *Brighton Brewery Co., Ltd.*, *Wright* v. *Same* (1864), 11 L. T. 560).

(*b*) *Hoole* v. *Great Western Rail. Co.* (1867), 3 Ch. App. 262.

(*c*) *Carlisle* v. *South Eastern Rail. Co.* (1850), 1 Mac. & G. 689, 699; *Macbride* v. *Lindsay* (1852), 9 Hare, 574, 585; *Fawcett* v. *Laurie* (1860), 1 Drew. & Sm. 192, 202, 203. As to the qualifications necessary to maintain an action "on behalf" and generally as to actions of this kind, see title COMPANIES, Vol. V., pp. 289—291, 319 *et seq.* The fact that a plaintiff sues at the instigation of a rival company is not of itself sufficient to prevent him from obtaining an injunction on the merits of the case (*Colman* v. *Eastern Counties Rail. Co.* (1846), 10 Beav. 1).

(*d*) *Hoole* v. *Great Western Rail. Co.*, *supra*, *per* ROLT, L.J. at pp. 277, 278.

(*e*) *Maunsell* v. *Midland Great Western (Ireland) Rail. Co.* (1863), 1 Hem. & M.

SECT. 3. Unincorporated Bodies.

SECT. 3.—*Unincorporated Bodies.*

504. The jurisdiction of the court to interfere in the case of clubs, societies, and other unincorporated bodies is based upon the right which the members have to the common use and enjoyment of the property which has been purchased or acquired by means of the funds contributed by such members (*f*). Where the contract between the parties creates a purely personal relationship, the court has no jurisdiction to interfere (*g*). Jurisdiction.

Thus a member of a proprietary club, in which members have no right of property, who has been expelled by a committee, though the proceedings were irregular, cannot obtain relief by way of an injunction (*h*). On the other hand, in the case of a members' club, in which members have rights of property, all the formalities relative to the expulsion of a member required by the rules must be strictly complied with, and, unless this is done, the court will grant an injunction (*i*). Clubs.

A trade union (*k*) may also be restrained from unlawfully expelling a member (*l*) or from misapplying its funds (*m*), the jurisdiction in cases of this kind being founded upon the right of property vested in the members (*n*). A trade union may also be restrained from acting *ultra vires*, or illegally (*o*). Trade unions.

130. As to when the court will interfere with actions of a company, see title COMPANIES, Vol. V., pp. 289, 290.

(*f*) *Forbes* v. *Eden* (1867), L. R. 1 Sc. & Div. 568, *per* Lord CRANWORTH, at p. 581; *Rigby* v. *Connol* (1880), 14 Ch. D. 482, *per* JESSEL, M.R., at pp. 487, 488; *Baird* v. *Wells* (1890), 44 Ch. D. 661, 675; *Millican* v. *Sulivan* (1888), 4 T. L. R. 203, C. A.

(*g*) *Millican* v. *Sulivan*, *supra*.

(*h*) *Baird* v. *Wells* (1890), 44 Ch. D. 661. For the classification of clubs, see title CLUBS, Vol. IV., p. 406.

(*i*) *Fisher* v. *Keane* (1878), 11 Ch. D. 353; *Labouchere* v. *Wharncliffe* (*Earl*) (1879), 13 Ch. D. 346; *Foster* v. *Harrison*, [1881] W. N. 171; *Baird* v. *Wells*, *supra*; and see *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal*, [1906] A. C. 535; *Harington* v. *Sendall*, [1903] W. N. 50. The rules of the club must be construed fairly, and in the same way as any other contract, and the court has no right to give the words other than their ordinary meaning, or to construe the rules otherwise than in their ordinary sense (*Dawkins* v. *Antrobus* (1881), 17 Ch. D. 615, *per* JESSEL, M.R., at p. 621, C. A.); and see title CLUBS, Vol. IV., pp. 415 *et seq.*

(*k*) A trade union registered under the Trade Union Acts, 1871 and 1876 (34 & 35 Vict. c. 31; 39 & 40 Vict. c. 22), may be sued in its registered name (*Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426).

(*l*) *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, C. A., distinguishing *Rigby* v. *Connol* (1880), 14 Ch. D. 482; *Chamberlain's Wharf, Ltd.* v. *Smith*, [1900] 2 Ch. 605, C. A.

(*m*) *Wolfe* v. *Matthews* (1882), 21 Ch. D. 194; *Yorkshire Miners' Association* v. *Howden*, [1905] A. C. 256.

(*n*) *Rigby* v. *Connol*, *supra*, at p. 487; see generally, title TRADE AND TRADE UNIONS.

(*o*) *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A. C. 87; and see *Wilson* v. *Amalgamated Society of Engineers* (1911), 27 T. L. R. 419.

Part IV.—Purposes for which an Injunction may be Granted.

SECT. 1.

SECT. 1.—*Prevention of Nuisance.*

Prevention of Nuisance.

Nuisance.

505. The jurisdiction of the court by way of injunction in nuisance cases (*p*) is in aid of the legal right, and is founded upon the necessity of preventing that sort of injury to property for which damages would not be an adequate or sufficient remedy. It rests upon the extent of the injury, and will be exercised only when the injury is of so material a character that it cannot be adequately compensated for by damages (*q*), or is of a continuing or recurring nature (*r*). An injunction will not usually be granted to restrain a temporary or occasional nuisance (*s*), but, if the nuisance is a continuing or recurring nuisance, an injunction will not be refused merely because the actual damage arising from it is slight (*t*).

SECT. 2.—*Prevention of Waste.*

Jurisdiction.

506. The jurisdiction of the court to interfere by way of injunction in the case of waste (*u*) is not limited to those cases where there is a right and remedy at law, but extends also to equitable waste (*a*) and to the cases in which there is an intervening legal estate (*b*).

(*p*) There is no distinction between the principles upon which the court acts in the case of private and public nuisances (*A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, 320, C. A.).

(*q*) *A.-G.* v. *Nichol* (1809), 16 Ves. 338, 342; *Soltau* v. *De Held* (1851), 2 Sim. (N. S.) 133, 159; *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, 319, 320, C. A.; *Jacomb* v. *Knight* (1863), 8 L. T. 621, C. A.; *Jackson* v. *Newcastle* (*Duke*) (1864), 3 De G. J. & Sm. 275, 283; *Curriers Co.* v. *Corbett* (1865), 12 L. T. 169; *Beadel* v. *Perry* (1868), 19 L. T. 760; and see generally, and as to injunctions in cases of particular nuisances, title NUISANCE.

(*r*) See note (*t*), *infra*.

(*s*) *A.-G.* v. *Sheffield Gas Consumers Co.*, *supra*; *Swaine* v. *Great Northern Rail. Co.* (1864), 4 De G. J. & Sm. 211, C. A.; *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349, 355; *Cooke* v. *Forbes* (1867), L. R. 5 Eq. 166; *A.-G.* v. *Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71; *A.-G.* v. *Preston Corporation* (1896), 13 T. L. R. 14.

(*t*) *A.-G.* v. *Sheffield Gas Consumers Co.*, *supra*; *A.-G.* v. *Cambridge Consumers Gas Co.*, *supra*, at p. 81; and see *Soltau* v. *De Held*, *supra*; *Grand Junction Canal Co.* v. *Shugar* (1871), 6 Ch. App. 483, 489; *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125, 142; *Thorpe* v. *Brumfitt* (1872), 8 Ch. App. 650, 656; *Lambton* v. *Mellish*, *Lambton* v. *Cox*, [1894] 3 Ch. 163 (where injunctions were granted); and see, generally, title NUISANCE. As to the form of an injunction restraining the erection of buildings so as to cause a nuisance or illegal obstruction of ancient lights, with liberty to apply for further relief by way of mandatory injunction or damages on completion of the building, see *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A. C. 179, 194; *Anderson* v. *Francis*, [1906] W. N. 160.

(*u*) See generally, title REAL PROPERTY AND CHATTELS REAL.

(*a*) As to the various kinds of waste and what acts constitute legal, equitable, and permissive waste respectively, see title REAL PROPERTY AND CHATTELS REAL.

(*b*) *Tracy* v. *Tracy* (1681), 1 Vern. 23; *Robinson* v. *Litton* (1744), 3 Atk. 209; *Farrant* v. *Lovel* (1750), 3 Atk. 723; and see *Austria* (*Emperor*) v. *Day and Kossuth*

SECT. 2. Prevention of Waste.

Where a serious act of waste is threatened or intended and the defendant insists on his right to commit it (*c*), the plaintiff need not wait until the waste is actually committed before applying for an injunction (*d*). An injunction will not be granted if the act of waste is trivial (*e*), but a small degree of waste, where there is an intention to do more, will be sufficient for the court to act on (*f*). The court will not decline to interfere, where waste has been committed, merely because the defendant has ceased committing waste upon the action being brought (*g*). Where equitable waste of one kind only has been done or is threatened, the injunction will not be extended to equitable waste of other kinds (*h*).

Effect of delay.

507. An application to stay waste should be made promptly (*i*), especially in the case of mines (*k*); but delay is not so material in the case of waste as in other applications for injunctions. For example, if a man allows half his trees to be cut down before he applies, the court will not therefore permit the remaining half to be cut down (*l*). If, however, the party committing waste has been encouraged to spend money and bestow labour upon the property by the acquiescence of the plaintiff, relief will be refused (*m*).

SECT. 3.—*Prevention of Trespass.*

Jurisdiction.

508. An injunction to prevent any threatened or apprehended trespass (*n*) may be granted either before, at, or after the hearing if

(1861), 3 De G. F. & J. 217, C. A., *per* TURNER, L.J., at p. 254. And see generally, as to the persons in whose favour and against whom injunctions to restrain legal and equitable waste respectively may be granted, and as to the right to an account when an injunction is granted, titles LANDLORD AND TENANT; MORTGAGE; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*c*) Or if he is out of possession, whether or not he claims a right to commit the act (see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); and see p. 202, *ante*).

(*d*) *Gibson* v. *Smith* (1741), 2 Atk. 182; *Coffin* v. *Coffin* (1821), Jac. 70, 71; *Campbell* v. *Allgood* (1853), 17 Beav. 623, 628; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).

(*e*) *Barry* v. *Barry* (1820), 1 Jac. & W. 651; *Doran* v. *Carroll* (1860), 11 I. Ch. R. 379, 383; *Grand Canal Co.* v. *M'Namee* (1891), 29 L. R. Ir. 131, C. A.; *Doherty* v. *Allman* (1878), 3 App. Cas. 709, *per* Lord BLACKBURN, at p. 733; or if it is "meliorating" waste (*Meux* v. *Cobley* (1891), 61 L. J. (CH.) 449).

(*f*) *Barry* v. *Barry*, *supra*.

(*g*) *Anon.* (1747), 3 Atk. 485; but see *Barry* v. *Barry*, *supra* (where, however, there were additional reasons for refusing the injunction). Planting potatoes in land previously ploughed is not such a breach of an injunction to stay waste as will be punished by attachment (*Brophy* v. *Quarry* (1832), Hayes, 449).

(*h*) *Coffin* v. *Coffin* (1821), Jac. 70, before Lord ELDON, L.C.; but see S. C. (1821), Madd. & G. 17, before LEACH, V.-C.

(*i*) *Barry* v. *Barry*, *supra*. In an urgent case an interim order will be granted (*Anwyl* v. *Owens* (1853), 1 W. R. 208).

(*k*) *Hilton* v. *Granville* (*Earl*) (1841), Cr. & Ph. 283; *Parrott* v. *Palmer* (1834), 3 My. & K. 632; *Clegg* v. *Edmondson* (1857), 8 De G. M. & G. 787, 807, 808, C. A. See generally as to mines, title MINES, MINERALS, AND QUARRIES.

(*l*) *A.-G.* v. *Eastlake* (1853), 11 Hare, 205, *per* PAGE WOOD, V.-C., at p. 228; see also *Courtown* (*Lord*) v. *Ward* (1802), 1 Sch. & Lef. 8; *Cregan* v. *Cullen* (1865), 16 I. Ch. R. 339, 347; *Elias* v. *Griffith* (1878), 8 Ch. D. 521, C. A.

(*m*) *Barry* v. *Barry*, *supra*, at p. 653; *Parrott* v. *Palmer*, *supra*; see *Elias* v. *Griffith* (1878), 8 Ch. D. 521, 525, C. A.

(*n*) See generally, title TRESPASS.

SECT. 3. Prevention of Trespass.

the court thinks fit, whether the person against whom the injunction is sought is, or is not, in possession under any claim of title or otherwise, or, if out of possession, does or does not claim the right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or either of the parties are legal or equitable (*o*).

Trespass by public companies or bodies taking land.

509. Injunctions will be granted in the case of trespass by public companies or bodies having statutory powers compulsorily to take and enter lands (*p*). As a general rule an injunction cannot be refused where it is clearly shown that a public company is exceeding its powers (*q*); but, if the company, acting *bonâ fide*, has made a mistake as to the lands it has valued and taken, and the question between the company and the landowner is merely one of value (*r*), or, it seems, if the company has taken land in excess of its powers, but the quantity and value of the land are extremely small (*s*), the court may decline to interfere.

Where public interest affected.

Where the injury affects the public interest, the action should be by way of information at the suit of the Attorney-General (*t*); but a private person who sustains special damage may sue alone and obtain an injunction, even though the public interest is concerned (*a*). Where the legislature has made special provision for the protection

(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8). See *Ardley* v. *St. Pancras Guardians* (1870), 39 L. J. (CH.) 871; *Stanford* v. *Hurlstone* (1873), 9 Ch. App. 116; *Goodson* v. *Richardson* (1874), 9 Ch. App. 221; *Allen* v. *Martin* (1875), L. R. 20 Eq. 462. As to the effect of the Judicature Act, 1873 (36 & 37 Vict. c. 66), see *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275, C. A., *per* JESSEL, M.R., at p. 286; *Smith* v. *Brown* (1879), 48 L. J. (CH.) 694; *Stocker* v. *Planet Building Society* (1879), 27 W. R. 877; and title TRESPASS; but compare *Leeds and Liverpool Navigation Co.* v. *Horsfall* (1889), 33 Sol. Jo. 183, C. A. As to the cases in which the court would interfere before the Judicature Act, 1873 (36 & 37 Vict. c. 66), see *Lowndes* v. *Bettle* (1864), 33 L. J. (CH.) 451, 455, 457.

(*p*) See generally, as to the powers, duties, and liabilities of public bodies and companies having compulsory powers to take and enter lands, and to the circumstances under which injunctions will be granted, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*, and in particular, pp. 24, 63, and *Agar* v. *Regent's Canal Co.* (1815), Coop. G. 77, 79; *River Dun Navigation Co.* v. *North Midland Rail. Co.* (1838), 1 Ry. & Can. Cas. 135, 154; *Frewin* v. *Lewis* (1838), 4 My. & Cr. 249, 255, 256; *Kemp* v. *London and Brighton Rail. Co.* (1839), 1 Ry. & Can. Cas. 495, 504; *Webb* v. *Manchester and Leeds Rail. Co.* (1839), 4 My. & Cr. 116, 120; *Sutton* v. *Norwich Corporation* (1858), 27 L. J. (CH.) 739, 741; *Price's Patent Candle Co., Ltd.* v. *London County Council*, [1908] 2 Ch. 526, C. A.; *Saunby* v. *London (Ontario) Water Commissioners*, [1906] A. C. 110, P. C.; and see p. 224, *ante*.

(*q*) See *River Dun Navigation Co.* v. *North Midland Rail. Co.*, *supra*.

(*r*) *Wood* v. *Charing Cross Rail. Co.* (1863), 33 Beav. 290. In this case ROMILLY, M.R., at p. 295, stated that the fact that the public would be inconvenienced was an element to be considered, *sed quære*; see *Stretton* v. *Great Western and Brentford Rail. Co.* (1870), 5 Ch. App. 751, 761; *Price* v. *Bala and Festiniog Rail Co.* (1884), 50 L. T. 787.

(*s*) *Dowling* v. *Pontypool, Caerleon, and Newport Rail. Co.* (1874), L. R. 18 Eq. 714.

(*t*) *Thorne* v. *Taw Vale Railway and Dock Co.* (1850), 13 Beav. 10, 21; *Bermondsey Vestry* v. *Brown* (1865), L. R. 1 Eq. 204, 215; *Stoke Parish Council* v. *Price*, [1899] 2 Ch. 277.

(*a*) See *Winterbottom* v. *Derby (Earl)* (1867), 36 L. J. (EX.) 194.

of a private individual, he may sue without either joining the Attorney-General or proving any particular damage (*b*). An injunction will not, however, be granted if the damage is trifling, notwithstanding that the company has exceeded its statutory powers (*c*). Nor can a private person obtain an injunction on the mere ground of a deviation by the company on another's land in the construction of its undertaking, which is not injurious to him (*d*).

Reversioner must show damage to reversion.

510. A reversioner will not obtain an injunction, unless he can show that damage is occasioned to his reversion by the trespass (*e*). The question of injury or no injury is one for the jury or the tribunal which has to find the facts of the case; and, where injury is found, the reversioner may obtain an injunction without joining his tenant as co-plaintiff (*f*).

SECT. 4.—*Protection of Contractual Rights.*

SUB-SECT. 1.—*In General.*

In general.

511. Contracts, or the covenants (*g*) contained therein, may be either affirmative or negative, or partly affirmative and partly negative. As a general rule the proper remedy of a party seeking to enforce the observance of a positive contract or covenant is by way of an action for specific performance (*h*). Where, on the other hand, the contract or covenant is negative in form, his proper remedy is by way of an injunction to restrain the breach thereof (*i*). Sometimes also, in the case of a positive contract, the court will import a negative covenant not to do anything inconsistent with the contract, and grant an injunction to restrain the breach of such implied covenant (*k*).

Proper remedy, specific performance.

Basis of jurisdiction.

The court assumes jurisdiction to restrain a breach of contract because the remedy at law is not sufficient, and the interest of the party requires that the act should be prevented, instead of his merely receiving damages by way of compensation (*l*).

(*b*) *Devonport Corporation* v. *Plymouth, Devonport, and District Tramways Co.* (1884), 52 L. T. 161, C. A.; and see *Price* v. *Bala and Festiniog Rail. Co.* (1884), 50 L. T. 787 (where a mandatory injunction was granted).

(*c*) *Holyoake* v. *Shrewsbury and Birmingham Rail. Co.* (1848), 5 Ry. & Can. Cas. 421; *Wintle* v. *Bristol and South Wales Union Rail. Co.* (1862), 10 W. R. 210; and see *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212, 228.

(*d*) *Lee* v. *Milner* (1837), 2 Y. & C. (EX.) 611.

(*e*) *Cooper* v. *Crabtree* (1882), 20 Ch. D. 589, C. A.; *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

(*f*) *Jones* v. *Llanrwst Urban Council*, [1911] 1 Ch. 393.

(*g*) As to the construction of covenants and to the circumstances under which covenants will be implied from the language of the contracting parties, and generally as to the construction of contracts, see titles CONTRACT, Vol. VII., pp. 509 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 475 *et seq.*

(*h*) See as to the remedy by way of specific performance and as to what contracts are capable of specific performance, titles CONTRACT, Vol. VII., p. 441; SPECIFIC PERFORMANCE. As to injunctions in aid of specific performance, see p. 249, *post*.

(*i*) See p. 238, *post*.

(*k*) See p. 243, *post*, and title CONTRACT, Vol. VII., p. 441.

(*l*) *Sainter* v. *Ferguson* (1849), 1 Mac. & G. 286; and see *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 604, 619; *Holmes* v. *Eastern Counties Rail. Co.* (1857), 3 K. & J. 675, 680.

SECT. 4. **Protection of Contractual Rights.**

Injunction only granted according to equitable rules and principles.

512. It is not in every case of breach of contract or covenant that the court will interfere by way of injunction. The mere fact that the contract or covenant in question is clear, and the breach clear, is not of itself sufficient to warrant the interference of the court, unless the contract or covenant is itself of such a nature that it can be enforced consistently with the rules and principles upon which the court acts in granting equitable relief. Thus the court will not interfere to restrain the breach of a covenant which would involve the supervision of the court (*m*). Nor will an injunction be granted to restrain the breach of an indefinite (*n*), ambiguous, and uncertain (*o*) or vague (*p*) covenant (*q*), or of a negative covenant which is coupled with other terms so vague and loose that the court cannot execute them (*r*). Nor will the court interfere where the covenant is oppressive (*a*) or harsh (*b*) towards the defendant, nor if the agreement in respect of which the breach has been committed is an illegal agreement (*c*).

Relief will also, generally, be refused if the damage apprehended from the breach is not irreparable or is susceptible of pecuniary compensation (*d*), or if the parties themselves treated the non-performance of the agreement as a subject for pecuniary compensation (*e*).

Where contract contains clause providing for payment of a sum of money in the event of a breach.

513. Where a contract contains a clause providing for the payment of a sum of money in the event of a breach, the jurisdiction of the court to interfere by way of injunction to restrain the breach will depend upon whether such sum was inserted to secure the performance of the contract, or whether it was intended by the parties to be the fixed price for which the act complained of might

(*m*) *Ryan* v. *Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116, C. A.; and see p. 246, *post*.

(*n*) *Mann* v. *Stephens* (1846), 15 Sim. 377, 379.

(*o*) *Low* v. *Innes* (1864), 4 De G. J. & Sm. 286, 296; and see *Bernard* v. *Meara* (1861), 12 I. Ch. R. 389.

(*p*) *Davies* v. *Davies* (1887), 36 Ch. D. 359, C. A.

(*q*) See also *Collins* v. *Plumb* (1810), 16 Ves. 454 (where the covenant was not to sell or dispose of water from a well to the injury of the plaintiffs).

(*r*) *Kimberley* v. *Jennings* (1836), 6 Sim. 340, 351.

(*a*) *Talbot* v. *Ford* (1842), 13 Sim. 173.

(*b*) *Kimberley* v. *Jennings*, *supra*, at p. 349.

(*c*) *Davies* v. *Makuna* (1885), 29 Ch. D. 596, C. A. The court will not lend its aid to enforce a contract which is against public policy as tending to provoke a breach of the peace (*Woodward* v. *Battersea Corporation* (1911), 104 L. T. 51).

(*d*) *Furness Rail. Co.* v. *Smith* (1847), 1 De G. & Sm. 299; *Garrett* v. *Banstead and Epsom Downs Rail. Co.* (1864), 4 De G. J. & Sm. 462, C. A.; but see p. 238, *post*, in the case of express negative covenants.

(*e*) *Paris Chocolate Co.* v. *Crystal Palace Co.* (1855), 3 Sm. & G. 119, 125; and see *Wood* v. *Sutcliffe* (1851), 2 Sim. (N. S.) 163, 168; but compare *Ainsworth* v. *Bentley* (1866), 14 W. R. 630. The fact that compensation has been accepted for a violation will not debar the plaintiff from obtaining relief, if there is, in other respects, a continued violation, and no acquiescence in such violation (*Mexborough (Earl)* v. *Bower* (1843), 7 Beav. 127, 132). Nor, prior to the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5), would an injunction be granted to restrain an action on a bill of exchange, where the plaintiff's object was merely to reduce the amount of his liability under the bill by the damages which he claimed for an alleged breach of the contract, in respect of which the bill was given (*Glennie* v. *Imri* (1839), 3 Y. & C. (EX.) 436).

lawfully be done. The question in every case is what is the meaning of the contract (*f*). If, on the one hand, the intention is that the named sum should be treated as the fixed price at which the defendant buys the right to do the act complained of, then, whether it is described in the contract as liquidated damages or as a penalty (*g*), the court will not grant an injunction. If, on the other hand, the intention is that the named sum should not be treated as the fixed price at which the defendant buys the right to do the act complained of, then, even if it is described in the contract as liquidated damages (*h*), an injunction will, in a proper case, be granted to restrain the breach (*i*). In the latter case a party cannot, however, have both an injunction and damages, but must elect which he will have (*k*). The court will not, on an interlocutory motion to dissolve an injunction, determine whether the sum was inserted by way of a penalty or as the price at which a breach might be committed (*l*).

Interlocutory injunctions.

514. In exercising its jurisdiction by way of interlocutory injunction, the court acts upon the principle of preventing irreparable injury (*m*). If a covenant is clear and the breach clear, and serious injury is likely to arise from the breach, the court will interfere before the hearing to restrain the breach; but if the covenant is obscure, or the breach doubtful, and no irreparable damage can arise to the plaintiff, then the question resolves itself into a question of comparative injury, whether the defendant will be more damnified by the injunction being granted, or the plaintiff by its being withheld (*n*).

Threatened breach.

515. The court's jurisdiction to interfere is not limited to cases where the breach has actually been committed; for, in the case

(*f*) *French* v. *Macale* (1842), 2 Dr. & War. 269, 274, 276; *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72, 94; *Dimech* v. *Corlett* (1858), 12 Moo. P. C. C. 199, 229; *Mercer* v. *Irving* (1858), E. B. & E. 563, 572; *Howard* v. *Woodward* (1864), 34 L. J. (CH.) 47; *National Provincial Bank of England* v. *Marshall* (1888), 40 Ch. D. 112, C. A.; and as to the construction of such provisions, see generally, title DAMAGES, Vol. X., p. 328.

(*g*) *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. 414.

(*h*) *Coles* v. *Sims* (1854), 5 De G. M. & G. 1, C. A.; *Howard* v. *Woodward, supra*; *General Accident Assurance Corporation* v. *Noel*, [1902] 1 K. B. 377; *National Provincial Bank of England* v. *Marshall, supra*; and see *French* v. *Macale, supra* (where, however, the injunction was refused on the ground that the act had been done; see *ibid.*, at p. 284).

(*i*) See also *Bird* v. *Lake* (1863), 1 Hem. & M. 111; *Fox* v. *Scard* (1863), 33 Beav. 327; *London and Yorkshire Bank, Ltd.* v. *Pritt* (1887), 56 L. J. (CH.) 987.

(*k*) *Sainter* v. *Ferguson* (1849), 1 Mac. & G. 287; *Carnes* v. *Nesbitt* (1862), 7 H. & N. 778; *Fox* v. *Scard, supra*; *Young* v. *Chalkley* (1867), 16 L. T. 286; *General Accident Assurance Corporation* v. *Noel, supra.*

(*l*) *Coles* v. *Sims, supra*, at p. 11.

(*m*) See p. 218, *ante*. As to the court's regard for the rights of third parties, see p. 207, *ante*.

(*n*) *Wilkinson* v. *Rogers* (1864), 2 De G. J. & Sm. 62, C. A., *per* TURNER, L.J., at p. 69; *Garrett* v. *Banstead and Epsom Downs Rail. Co.* (1864), 4 De G. J. & Sm. 462, 466, C. A.; and see *Dover Harbour* (*Warden etc.*) v. *South Eastern Rail. Co.* (1852), 9 Hare, 489, 493. As to the granting of a mandatory injunction on an interlocutory application, see p. 223, *ante*.

SECT. 4. Protection of Contractual Rights.

of a contract, it is enough if the defendant claims or insists on a right to do the act (*o*); but an interlocutory injunction will not be granted in cases of this kind, unless it is clear that a breach must result from the acts of the defendant (*p*).

SUB-SECT. 2.—*Express Negative Covenants.*

Proof of damage unnecessary.

516. Where parties to a contract for valuable consideration, with their eyes open, contract that a particular thing shall not be done, proof of damage is not necessary, as a general rule, in order to entitle the plaintiff to a perpetual injunction to restrain the breach thereof (*q*). If the construction of the contract is clear and the breach is clear, the mere circumstance of the breach affords sufficient ground for the injunction (*a*). In such case the court has no discretion to exercise. All that it has to do is to say by way of injunction (*b*) that the thing shall not be done. The injunction does nothing more than give the sanction of the process of the court to that which is already the contract between the parties. It is, in effect, the specific performance by the court of that negative bargain which the parties made with their eyes open (*c*).

Ineffectual defences.

The fact that the breach has not occasioned the plaintiff any loss (*d*), or that the act complained of has in fact effected an improvement of his property (*e*), is no defence, nor does the fact that the breach has been committed in connection with a matter of great public importance (*f*), or that compliance with the covenant in question would involve inconvenience to the public (*g*), make any difference.

(*o*) *Tipping* v. *Eckersley* (1855), 2 K. & J. 264, 270.

(*p*) *Worsley* v. *Swann* (1882), 51 L. J. (CH.) 576, C. A.; and see *Pattisson* v. *Gilford* (1874), L. R. 18 Eq. 259; and see p. 218, *ante*.

(*q*) *Doherty* v. *Allman* (1878), 3 App. Cas. 709, 720; *Allen* v. *Seckham* (1878), 47 L. J. (CH.) 742 (mandatory); *Formby* v. *Barker*, [1903] 2 Ch. 539, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 554; and see *Elliston* v. *Reacher*, [1908] 2 Ch. 374, *per* PARKER, J., at p. 395.

(*a*) *Tipping* v. *Eckersley*, *supra*; *Manners* (*Lord*) v. *Johnson* (1875), 1 Ch. D. 673; *Richards* v. *Revitt* (1877), 7 Ch. D. 224; *Collins* v. *Castle* (1887), 36 Ch. D. 243, 254; see *Piggott* v. *Stratton* (1859), John. 341, 355; *Western* v. *MacDermott* (1866), 2 Ch. App. 72, 75; and see p. 242, *post*, as to contracts containing both positive and negative covenants.

(*b*) *I.e.*, either restrictive or mandatory (where the circumstances of the case require it), or both.

(*c*) *Doherty* v. *Allman*, *supra*, *per* Lord CAIRNS, L.C., at pp. 719, 720; and see *McEacharn* v. *Colton*, [1902] A. C. 104, 107, P. C.

(*d*) *Kemp* v. *Sober* (1851) 1 Sim. (N. S.) 517; *Dickenson* v. *Grand Junction Canal Co.* (1852), 15 Beav. 260, 270; *Manners* (*Lord*) v. *Johnson*, *supra*, at p. 679.

(*e*) *Mexborough* (*Earl*) v. *Bower* (1843), 7 Beav. 127, 130; *Dickenson* v. *Grand Junction Canal Co.*, *supra*, at p. 271; *Wells* v. *Attenborough* (1871), 24 L. T. 312; *Manners* (*Lord*) v. *Johnson*, *supra*; but in such a case an interlocutory injunction would not be granted if the result would be to inflict a serious injury on the covenantee (*Wells* v. *Attenborough*, *supra*), and see p. 221, *ante*.

(*f*) *Lloyd* v. *London, Chatham and Dover Rail. Co.* (1865), 2 De G. J. & Sm. 568, 579, C. A.

(*g*) *A.-G.* v. *Mid-Kent Rail. Co. and South-Eastern Rail. Co.* (1867), 3 Ch. App. 100; and see *Foster* v. *Birmingham, Wolverhampton and Dudley Rail. Co. and Birmingham and Oxford Junction Rail. Co.* (1854), 2 W. R. 378; *Lloyd* v. *London, Chatham and Dover Rail. Co. supra*, as reported 34 L. J. (CH.) 401; *Raphael* v. *Thames Valley Rail. Co.* (1867), 2 Ch. App. 147; *Hood* v. *North Eastern Rail. Co.* (1870), 5 Ch. App. 525.

The court will not take into consideration the question of the balance of convenience (*h*), unless the circumstances of the case are very special (*i*).

When court will not interfere.

517. The court will not, however, interfere if the violation is so small, slight, and formal that the plaintiff has no ground in conscience to complain of it (*k*); but it requires a very clear case before the court will decline to interfere on the sole ground that the damage to arise from the breach would be inappreciable (*l*).

Negative covenant in leases the breach of which may be restrained.

518. Thus in a proper case the court will restrain the breach of covenants in leases not to carry on any business, trade or calling (*m*), or a particular trade (*n*) or trades (*o*), or any trade other than a specified trade (*p*), or not to sell any malt liquors other than such as shall have been purchased from the landlord (*q*), or of covenants not to alter the demised premises without the consent of the landlord (*r*), or not to affix or permit any outward mark or show of business on the demised premises (*s*), or not to permit or suffer anything to be done to the annoyance or damage of the landlord's adjoining premises (*t*), or of covenants not to assign

(*h*) *Dickenson* v. *Grand Junction Canal Co.* (1852), 15 Beav. 260, 269, 270; *Doherty* v. *Allman* (1878), 3 App. Cas. 709, 720.

(*i*) *Leader* v. *Moody* (1875), L. R. 20 Eq. 145, 153 (where the acts in question were temporary only).

(*k*) *Harrison* v. *Good* (1871), L. R. 11 Eq. 338, 352. The interference with privacy is not a trivial matter (*Andover* (*Lady*) v. *Robertson* (1855), 26 L. T. (o. s.) 23; and see *Manners* (*Lord*) v. *Johnson* (1875), 1 Ch. D. 673).

(*l*) *Lloyd* v. *London, Chatham and Dover Rail. Co.* (1865), 2 De G. J. & Sm. 568, 580, C. A.

(*m*) *Johnstone* v. *Hall* (1856), 2 K. & J. 414 (schools); *Bramwell* v. *Lacy* (1879), 10 Ch. D. 691 (hospital for poor persons where small payments were made by patients according to means); *Rolls* v. *Miller* (1884), 27 Ch. D. 71, C. A. (home for working girls where the inmates were provided with board and lodging, whether any payment was taken or not). Payment is not essential to constitute a business, nor does payment necessarily make that a business which, without payment, would not be one (*Rolls* v. *Miller*, *supra*). As to covenants in leases generally, see title LANDLORD AND TENANT.

(*n*) *Parker* v. *Whyte* (1863), 32 L. J. (CH.) 520; *Parker* v. *Whyte* (1863), 1 Hem. & M. 167 (auctioneer); *Holloway Brothers, Ltd.* v. *Hill*, [1902] 2 Ch. 612 (tailor); and see *Treacher & Co., Ltd.* v. *Treacher*, [1874] W. N. 4 (where the covenant was not to carry on a specified trade, retail). See also *Barret* v. *Blagrave* (1800), 5 Ves. 555 (where, however, the injunction was dissolved on appeal on the ground of acquiescence).

(*o*) *Chapman* v. *Mason and the Liniline Co.* (1910), 103 L. T. 390 (dangerous trade).

(*p*) *Clements* v. *Welles* (1865), L. R. 1 Eq. 200; and see *Brigg* v. *Thornton*, [1904] 1 Ch. 386, C. A.

(*q*) *Courage & Co., Ltd.* v. *Carpenter*, [1910] 1 Ch. 262, which see as to the form of order in such case.

(*r*) *Haigh* v. *Waterman*, [1867] W. N. 150; *De Nicols* v. *Abels*, [1869] W. N. 14; *Brocklesby* v. *Munn*, [1870] W. N. 42. As to the limitation which must be placed on covenants not to make or suffer any alterations of the demised premises, see *Bickmore* v. *Dimmer*, [1903] 1 Ch. 158, C. A. (where a mandatory injunction to compel the tenant, a jeweller, to remove a clock affixed by him to the outside of the premises was refused).

(*s*) *Evans* v. *Davis* (1878), 10 Ch. D. 747; *Moore* v. *Ullcoats Mining Co., Ltd.*, [1908] 1 Ch. 575.

(*t*) *Collins* v. *Slade*, [1874] W. N. 205 (premises used as a place of public entertainment); *Tod-Heatly* v. *Benham* (1888), 40 Ch. D. 80, C. A. (hospital); *Wood* v. *Cooper*, [1894] 3 Ch. 671 (trellis screen).

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without the lessor's consent (*u*). A lessee of a coal mine may be restrained from removing pillars of coal contrary to the terms of his covenant (*a*), and a lessee, who has covenanted not to remove machinery for a fixed period, in order to enable the lessor to find a purchaser thereof, may be restrained from removing the machinery during such period (*b*). So, also, tenants may be restrained from committing breaches of their farming covenants (*c*). The circumstance that a lessor has a right of entry for breach of covenant does not preclude him from applying for an injunction to restrain the commission of the breach (*d*).

Purchasers.

Purchasers or owners of lands and houses may be restrained from violating covenants restricting the user or enjoyment thereof (*e*).

Authors.

Authors, who have sold the copyright of works published by them, may be restrained from publishing works in breach of covenant (*f*); and, in a proper case, a husband (*g*) or a wife (*h*) will be prevented by injunction from committing breaches of negative covenants contained in a separation deed.

Husband and wife.

Miscellaneous.

So, also, defendants may be restrained from ringing church bells at stated times contrary to covenant (*i*), and a man who has agreed not to

(*u*) *McEacharn* v. *Colton*, [1902] A. C. 104, P. C.

(*a*) *Mostyn* v. *Lancaster*, *Taylor* v. *Mostyn* (1883), 23 Ch. D. 583, C. A.; and see *Mexborough* (*Earl*) v. *Bower* (1843), 7 Beav. 127 (where the injunction was in effect mandatory).

(*b*) *Hamilton* v. *Dunsford* (1857), 6 I. Ch. R. 412.

(*c*) *Grey de Wilton* (*Lord*) v. *Saxon* (1801), 6 Ves. 106; *Fleming* v. *Snook* (1842), 5 Beav. 250; *Lybbe* v. *Hart* (1885), 29 Ch. D. 8, C. A.; *Chapman* v. *Smith*, [1907] 2 Ch. 97; and see p. 245, *post*. In *Lybbe* v. *Hart*, *supra*, the injunction was granted against the trustee in bankruptcy of the tenant. As to covenants of this kind running with the land, see *Chapman* v. *Smith*, *supra* (where the injunction was granted at the suit of the assignee of the reversion). See also titles LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL.

(*d*) *Parker* v. *Whyte* (1863), 32 L. J. (CH.) 520.

(*e*) *Kemp* v. *Sober* (1851), 1 Sim. (N. S.) 517 (covenant not to carry on any business); *A.-G.* v. *Briggs*, *A.-G.* v. *Birmingham and Oxford Junction Rail. Co.* (1855), 1 Jur. (N. S.) 1084 (covenant not to erect buildings on the land); *Hodson* v. *Coppard* (1860), 29 Beav. 4 (covenant not to carry on particular trades); *Lloyd* v. *London, Chatham and Dover Rail. Co.* (1865), 2 De G. J. & Sm. 568, C. A. (covenant not to build beyond a certain height); *Hill* v. *Box* (1870), 18 W. R. 820 (where the erection of a public-house, which was impliedly, though not expressly, forbidden, was restrained); *Manners* (*Lord*) v. *Johnson* (1875), 1 Ch. D. 673 (covenant not to erect buildings nearer the road than the line of frontage of the existing houses); *German* v. *Chapman* (1877), 7 Ch. D. 271, C. A. (covenant not to carry on any business); *Hobson* v. *Tulloch*, [1898] 1 Ch. 424 (covenant not to use house otherwise than as a dwelling-house broken by using it as a boarding-house for scholars); *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, C. A. (covenant that not more than one house should be erected on a plot broken by erecting flats, and a covenant not to use a house otherwise than as a dwelling-house broken by using it for flats); *Abbey* v. *Gutteres* (1911), 55 Sol. Jo. 364 (covenant to keep windows obscured and fixed). See also title EQUITY, Vol. XIII., p. 100.

(*f*) *Barfield* v. *Nicholson* (1824), 2 Sim. & St. 1; *Ingram* v. *Stiff* (1859), 5 Jur. (N. S.) 947; and see *Ainsworth* v. *Bentley* (1866), 14 W. R. 630, where the covenant was not to publish a magazine of a particular description. In such a case the court would not take so harsh a step as to stop publication altogether until the hearing, but would limit the injunction to the named magazine only (*ibid.*).

(*g*) *Sanders* v. *Rodway* (1852), 16 Beav. 207; *Hunt* v. *Hunt* (1862), 4 De G. F. & J. 221; see, generally, title HUSBAND AND WIFE, Vol. XVI., pp. 450, 451.

(*h*) *Besant* v. *Wood* (1879), 12 Ch. D. 605; and see *Marshall* v. *Marshall* (1879), 5 P. D. 19; *Clark* v. *Clark* (1885), 10 P. D. 188, C. A.

(*i*) *Martin* v. *Nutkin* (1725), 2 P. Wms. 267.

enter up a judgment nor to publish it in any way, may be restrained from advertising it for sale, where the threat for sale is not made *bonâ fide* for the purpose of sale, but only to get better terms (*k*).

The court has jurisdiction to restrain the breach of a contract not to apply to Parliament (*l*).

Covenants in restraint of trade.

519. The court will also enforce by injunction negative covenants in restraint or partial restraint of trade, where such covenants are not wider than is reasonably necessary for the protection of the covenantee and are not injurious to the public interest (*m*).

Mandatory injunction.

520. Similarly, where the injunction asked for is a mandatory injunction to enforce a negative contract, the main point is whether the contract has been broken or not (*n*). In such cases, as a general rule, a mandatory injunction will be granted, although no damage or injury is shown (*o*), though in special circumstances the court may refuse the mandatory injunction and give damages instead (*p*).

Reversioner must show damage.

521. In the case of an application for an injunction by a reversioner, somewhat different considerations apply; and, in order to obtain an injunction to restrain the breach of restrictive covenants affecting the estate, he must bring his case within the legal principles applicable to damages and show that special damage is done to the reversion (*q*).

Covenants restricting the user of land.

522. Where property is acquired by gift or purchase by one person from another, with knowledge of a previous contract, lawfully and for valuable consideration made by the latter with a third party, to use the property for a particular purpose in a specified manner, the acquirer will be restrained from using the property in a manner not allowable to the donor or vendor (*r*). The jurisdiction of the court to restrain the breach of covenants restricting the user of land is not confined to covenants which run with the land at law (*s*). The question is, whether the party shall be

(*k*) *Jamieson* v. *Teague* (1857), 3 Jur. (N. S.) 1206.

(*l*) *Heathcote* v. *North Staffordshire Rail. Co.* (1850), 2 Mac. & G. 100; *A.-G.* v. *Manchester and Leeds Rail. Co.* (1838), 1 Ry. & Can. Cas. 436; *Lancaster and Carlisle Rail. Co.* v. *North Western Rail. Co.* (1856), 2 K. & J. 293; *Re London, Chatham and Dover Railway Arrangement Act*, 1867, *Ex parte London, Chatham, and Dover Rail. Co.* (1869), 20 L. T. 718, C. A.; and see p. 205, *ante*, and generally, title PARLIAMENT.

(*m*) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535; even as against an infant (*Evans* v. *Ware*, [1892] 3 Ch. 502; *Merriott* v. *Martin* (1899), 43 Sol. Jo. 717); and see generally, title TRADE AND TRADE UNIONS.

(*n*) *A.-G.* v. *Mid-Kent Rail. Co. and South-Eastern Rail. Co.* (1867), 3 Ch. App. 100.

(*o*) *Manners (Lord)* v. *Johnson* (1875), 1 Ch. D. 673, 679, 680.

(*p*) *Bowes* v. *Law* (1870), L. R. 9 Eq. 636; *Kilbey* v. *Haviland* (1871), 19 W. R. 698; and see *Lloyd* v. *London, Chatham and Dover Rail. Co.* (1865), 2 De G. J. & Sm. 568, C. A.

(*q*) *Johnstone* v. *Hall* (1856), 2 K. & J. 414; and see generally, titles DAMAGES, Vol. X., pp. 340, 341; LANDLORD AND TENANT.

(*r*) *De Mattos* v. *Gibson* (1859), 4 De G. & J. 276, 282; and see *Catt* v. *Tourle* (1869), 4 Ch. App. 654, 657.

(*s*) As to such covenants, see titles LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL.

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permitted to use the land in a manner inconsistent with the contract, entered into by the person from whom he acquired it, of which he had notice when he acquired it (*a*). This doctrine is, however, limited to restrictive covenants, and will not be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs or otherwise which does not run with the land (*b*).

SUB-SECT. 3.—*Contract containing Express Covenants, both Positive and Negative.*

Contract with positive and negative covenants.

Positive covenants incapable of specific performance.

523. In the case of a contract containing both positive and negative covenants, the court can, and will, in a proper case, restrain breaches of the negative covenants with a view to the complete performance of the contract (*c*). This jurisdiction will be exercised even where the positive covenants are of such a nature as to be incapable of specific performance, as, for example, in the case of a contract for personal service (*d*), or for the sale of chattels (*e*),

(*a*) *Tulk* v. *Moxhay* (1848), 2 Ph. 774, 777, 778; *Coles* v. *Sims* (1854), 5 De G. M. & G. 1, 8, C. A.; *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, 773, C. A.; *Wilson* v. *Hart* (1866), 1 Ch. App. 463; *Western* v. *Macdermott* (1866), 2 Ch. App. 72; *Richards* v. *Revitt* (1877), 7 Ch. D. 224; *Holloway Brothers, Ltd.* v. *Hill*, [1902] 2 Ch. 612; *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, C. A.; and see *Wilkes* v. *Spooner* (1911), 55 Sol. Jo. 479, C. A. (a new lessee, who takes with notice of restrictive covenants existing between a former lessee and a purchaser from him before such former lessee surrendered his lease, is not bound thereby, but can deal with the premises in any way in which he is entitled by the terms of his lease). See generally, for further instances in which persons acquiring property have been held to be bound by restrictive covenants, and against whom injunctions have been granted, and as to what constitutes sufficient notice, titles EQUITY, Vol. XIII., p. 100; REAL PROPERTY AND CHATTELS REAL.

(*b*) *Austerberry* v. *Oldham Corporation*, *supra*. See also title EQUITY, Vol. XIII., p. 100.

(*c*) See *Rankin* v. *Huskisson* (1830), 4 Sim. 13. Relief will not be refused merely because there are other covenants by the plaintiffs which may possibly be broken in the future (*Rigby* v. *Great Western Rail. Co.* (1846), 15 L. J. (CH.) 266; affirmed on appeal (1846), 2 Ph. 44; and see *Waring* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1849), 7 Hare, 482). An injunction will not, however, be granted with a view to specific performance of an agreement to grant a lease where, if the agreement was specifically performed, the lease could be put an end to by the clause of re-entry which the lease would contain (*Gourlay* v. *Somerset* (*Duke*) (1812), 1 Ves. & B. 68, *per* Lord ELDON, L.C., at p. 72).

(*d*) *Morris* v. *Colman* (1812), 18 Ves. 437 (where a man was restrained from writing for any other than a particular theatre); *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 604, overruling *Kemble* v. *Kean* (1829) 6 Sim. 333, and *Kimberley* v. *Jennings* (1836), 6 Sim. 340 (where the defendant was restrained from singing elsewhere than at the plaintiff's theatre); *Stiff* v. *Cassell* (1856), 2 Jur. (N. S.) 348 (where an author was restrained at the suit of the publisher of a newspaper from writing for any other newspaper); *Daggett* v. *Ryman* (1868), 16 W. R. 302 (where the defendant was restrained from setting up the same business as that of the plaintiff in the same neighbourhood); *Grimston* v. *Cuningham*, [1894] 1 Q. B. 125 (where the defendant was restrained from acting at any other theatre than that at which the plaintiff's company played); *Robinson* (*William*) *& Co., Ltd.* v. *Heuer*, [1898] 2 Ch. 451, C. A. (where the defendant was restrained from engaging in any business competing with that of the plaintiff, his employer, in breach of negative covenants). But an interim injunction ought not to be granted where the result would be to prevent the defendant from earning his livelihood (*Palace Theatre, Ltd.* v. *Clensy and Hackney and Shepherd's-Bush Empire Palaces, Ltd.* (1909), 26 T. L. R. 28, C. A., *per* VAUGHAN WILLIAMS, L.J.).

(*e*) *Dietrichsen* v. *Cabburn* (1846), 2 Ph. 52; *Donnell* v. *Bennett* (1883),

provided that the negative part of the contract is capable of being separated from the rest of the contract (*f*) and, where the contract is one relating to personal services, is not unreasonable (*g*). In such cases the court repudiates the idea of indirectly compelling performance where it could not directly enforce it; but it gives all the relief in its power, without looking to the effect which may ultimately be produced by the restraint which it places on the party who is disposed to break his contract (*h*), although the effect of such an injunction may be to compel the specific performance of the contract (*i*).

Doctrine has been criticised.

This doctrine has, however, been criticised (*k*), and is not to be extended (*l*). It seems that the right to an injunction in cases of this kind will not now be held to depend upon the use of a negative rather than a positive form of expression, and that if the substance of the contract is such that it ought not to be performed specifically, an injunction will not be granted merely because the covenant is in a negative rather than a positive form, nor, on the other hand, will the injunction necessarily be refused merely because the agreement contains no negative stipulation (*m*).

SUB-SECT. 4.—*Implied Negative Covenants.*

Sometimes a negative covenant will be implied.

524. Where there is no negative covenant, but only an affirmative covenant, the court, although it cannot enforce affirmatively the performance of the covenant, will sometimes, in special cases, interpose to prevent that being done which would be a departure from, and a violation of, the covenant (*n*). In such cases the court imports a negative covenant not to act inconsistently with the

22 Ch. D. 835; and see the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52.

(*f*) *Rolfe* v. *Rolfe* (1846), 15 Sim. 88; *Kernot* v. *Potter* (1862), 3 De G. F. & J. 447, 459, C. A.

(*g*) *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671 (where ROMER, J., held that the negative covenant was unreasonable and refused the injunction); and see *Robinson (William) & Co., Ltd.* v. *Heuer*, [1898] 2 Ch. 451, C. A. (where, however, the injunction was granted). Although a master cannot sue an apprentice on his covenant while still an apprentice, a negative covenant to abstain from doing something after the apprenticeship is over may be enforced by injunction after the termination of the apprenticeship, if it is reasonable (*Gadd* v. *Thompson*, [1911] 1 K. B. 304).

(*h*) *De Mattos* v. *Gibson* (1859), 4 De G. & J. 276, 299.

(*i*) *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 604, *per* Lord ST. LEONARDS, L.C., at pp. 615, 616.

(*k*) *Wolverhampton and Walsall Rail. Co.* v. *London and North-Western Rail. Co.* (1873), L. R. 16 Eq. 433, 440; and see *Brett* v. *East India and London Shipping Co., Ltd.* (1864), 2 Hem. & M. 404.

(*l*) *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416, C. A., *per* LINDLEY, L.J., at p. 428.

(*m*) See *Wolverhampton and Walsall Rail. Co.* v. *London and North-Western Rail. Co.*, *supra*, at p. 440; *Donnell* v. *Bennett* (1883), 22 Ch. D. 835; *Davis* v. *Foreman*, [1894] 3 Ch. 654; *Ehrman* v. *Bartholomew*, *supra*; *Metropolitan Electric Supply Co., Ltd.* v. *Ginder*, [1901] 2 Ch. 799; *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413; and see *infra*. In *Peperno* v. *Harmiston* (1886), 31 Sol. Jo. 154, C. A., the Court of Appeal held that it was now the rule not to grant an injunction where specific performance was impossible unless damages would be an absolutely inadequate remedy for the non-performance of the agreement.

(*n*) *De Mattos* v. *Gibson*, *supra*; *Doherty* v. *Allman* (1878), 3 App. Cas. 709, 720; *Jackson* v. *Astley* (1883), Cab. & El. 181; and see *Hudson* v. *Cripps*, [1896] 1 Ch. 265.

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agreement, and restrains by injunction the breach of such implied negative covenant. The law is, however, in rather an indefinite state as to when an injunction to restrain breaches of covenant ought to be refused, on the ground that specific performance is impossible, and there is no distinct line to be found in the authorities dividing the class of case in which the court, feeling that it has no power to decree specific performance, nevertheless grants an injunction to restrain the breach of one or more of the stipulations in the contract, from the class of case in which it declines to interfere (*o*).

Cases in which a negative covenant has been implied.

525. Thus on the one hand a contract to give a party the first refusal of property is deemed to involve a negative contract not to part with the property to any other person without giving that first refusal (*p*), and a covenant by a man to take the whole of the electric energy required for his premises from the plaintiff implies a negative covenant not to take electric energy from anyone else (*q*).

Covenant for quiet enjoyment.

So a lessor who has covenanted with his lessee for quiet enjoyment will be restrained from acting in such a manner as to deprive his lessee of the benefit of the covenant (*r*). A covenant by an underlessor to observe the lessee's covenants in the head lease will not be affected by such underlessor subsequently surrendering his lease and taking a new one not containing the old restrictions, and in such a case the underlessee will be entitled to an injunction to restrain his lessor from acting in contravention of such covenants (*s*).

Removal of fixtures.

Again, lessees, who have covenanted to yield up at the end of the term all fixtures, will be restrained from removing trade fixtures (*t*); and an injunction may also be granted to restrain a lessee from pulling down buildings on the demised premises and carrying away the materials just before the end of the term, notwithstanding a covenant by him to repair and surrender the same in good

(*o*) *Fothergill* v. *Rowland* (1873), L. R. 17 Eq. 132, 141; *Keith, Prowse & Co.* v. *National Telephone Co.*, [1894] 2 Ch. 147, 153.

(*p*) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37, 51, C. A.; compare *Ryan* v. *Thomas* (1911), 55 Sol. Jo. 364.

(*q*) *Metropolitan Electric Supply Co., Ltd.* v. *Ginder*, [1901] 2 Ch. 799; and see *Keith, Prowse & Co.* v. *National Telephone Co.*, *supra* (where the defendants, who had agreed to erect and maintain a telephone wire, were restrained from interfering with the wire after it had been erected).

(*r*) *Tipping* v. *Eckersley* (1855), 2 K. & J. 264; and see *Pattisson* v. *Gilford* (1874), L. R. 18 Eq. 259; *Browne* v. *Flower*, [1911] 1 Ch. 219. But a landowner who has demised the right of shooting for a term of years over his land will not be thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting (*Gearns* v. *Baker* (1875), 10 Ch. App. 355). An injunction was granted in *Tebb* v. *Cave*, [1900] 1 Ch. 642, although neither the title to the land nor the possession was affected by the act complained of, but the correctness of this decision has been doubted; see *Davis* v. *Town Properties Investment Corporation, Ltd.*, [1903] 1 Ch. 797, C. A. Generally, as to what acts will amount to a breach of a covenant for quiet enjoyment, see title LANDLORD AND TENANT.

(*s*) *Piggott* v. *Stratton* (1859), 1 De G. F. & J. 33, C. A. As to preventing breach of a covenant by a party who at the date of the covenant had no power to perform it, but who subsequently becomes able to do so, see *Newmarch* v. *Brandling* (1818), 3 Swan. 99.

(*t*) *Bidder* v. *Trinidad Petroleum Co.* (1868), 17 W. R. 153; and see *Sunderland* v. *Newton* (1830), 3 Sim. 450. See also *Lambourn* v. *McLellan*, [1903] 2 Ch. 268, C. A. (where the general words of the covenant were held not to include trade fixtures).

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condition (*a*). So, also, although the court cannot specifically enforce a covenant to repair, it will in a proper case restrain a defendant from injuring or removing property (*b*); and, similarly, it will prevent the lessee of an inn, who has covenanted to keep it open as an inn, from doing acts which would put it out of his power or the power of another to carry on the business (*c*). Again, a tenant of a farm, who has covenanted to manage and cultivate his farm in a husbandmanlike manner, may be restrained from committing voluntary waste or acting contrary to the custom of the country (*d*); but, if what is asked for is in reality judgment for specific performance of the covenants in a farming lease, the court will decline to interfere (*e*).

Against tenants.

So, also, a corporation, which grants the exclusive right for a limited period to persons to sell certain goods on its premises, will be restrained from evicting such persons (*f*), or from permitting the sale by other persons of like goods (*g*).

Against public bodies.

526. On the other hand, the court will often decline to import a negative into contracts of this kind and to interfere by way of

Instances when the court will

(*a*) *London Corporation* v. *Hedger* (1810), 18 Ves. 355; but see *contra*, *Re McIntosh and Pontypridd Improvements Co., Ltd.* (1891), 61 L. J. (Q. B.) 164 (where, however, the question arose long before the end of the lease).

(*b*) *Bathurst (Earl)* v. *Burden* (1786), 2 Bro. C. C. 64; *Lane* v. *Newdigate* (1804), 10 Ves. 192; *Newton* v. *Nock* (1880), 43 L. T. 197; and see *Bernard* v. *Meara* (1861), 12 I. Ch. R. 389.

(*c*) *Hooper* v. *Broderick* (1840), 9 L. J. (CH.) 321, better reported on this point, *Hooper* v. *Brodrick* (1840), 11 Sim. 47.

(*d*) See title AGRICULTURE, Vol. I., p. 251; and in addition to the cases there cited, see *Kimpton* v. *Eve* (1813), 2 Ves. & B. 349; *Lybbe* v. *Hart*, [1883] W. N. 61, 127 (to restrain the removal of hay, straw, dung or manure produced on the farm); *Rogers* v. *Price* (1849), 13 Jur. 820 (turning goats into a wood). In *Onslow* v. —— (1809), 16 Ves. 173, the breach was in respect of the implied covenant on the part of a tenant from year to year to treat the farm in a husbandmanlike manner.

(*e*) *Phipps* v. *Jackson* (1887), 56 L. J. (CH.) 550.

(*f*) *Holmes* v. *Eastern Counties Rail. Co.* (1857), 3 K. & J. 675.

(*g*) *Altman* v. *Royal Aquarium Society* (1876), 3 Ch. D. 228; and for further instances where the court has interposed to restrain acts in violation of or inconsistent with subsisting contracts, in the absence of any negative covenant, see *Newmarch* v. *Brandling* (1818), 3 Swan. 99; *Phillips* v. *Treeby* (1862), 8 Jur. (N. S.) 999 (to restrain the obstruction of rights of way); *Foster* v. *Birmingham, Wolverhampton and Dudley Rail. Co. and Birmingham and Oxford Junction Rail. Co.* (1854), 2 W. R. 378 (to restrain the construction of a road at a lower level than that provided for by the agreement); *Frogley* v. *Lovelace (Earl)* (1859), John. 333 (to restrain a landlord from interfering with his tenant in the exercise of the exclusive right of sporting and killing game); *Edinburgh and Glasgow Rail. Co.* v. *Campbell* (1863), 4 Macq. 570, H. L.; *Slee* v. *Bradford Corporation* (1863), 4 Giff. 262 (where there was no absolute agreement, but only an understanding by which the plaintiff had been misled); *Hood* v. *North Eastern Rail. Co.* (1870), 5 Ch. App. 525 (from stopping less than a certain number of trains at a station); *Wolverhampton and Walsall Rail. Co.* v. *London and North-Western Rail. Co.* (1873), L. R. 16 Eq. 433 (in effect to compel the defendants to use their line as agreed); *Nuneaton Local Board* v. *General Sewage Co.* (1875), L. R. 20 Eq. 127 (from permitting sewage to remain in sewers, so as to be a nuisance or damage to the plaintiffs); *Ashworth* v. *Hebden Bridge Local Board* (1877), 47 L. J. (CH.) 195 (to restrain enforcing an order for payment of rates in breach of an agreement not to do so for three months); *Jones (James) & Sons, Ltd.* v. *Tankerville (Earl)*, [1909] 2 Ch. 440 (to restrain the defendant from preventing the due execution of a contract for the purchase of timber to be cut and removed by the purchaser).

SECT. 4. Protection of Contractual Rights.

injunction to restrain the breach thereof. For example, it will not do so where specific performance of the affirmative contract is impossible (*h*), or in the case of a contract for personal service (*i*), or in the case of some contracts for the sale and delivery of chattels which are not specifically enforceable (*j*), or where the contract would require the constant supervision of the court, which it has always declined to give (*k*), or if the terms sought to be enforced are too vague, uncertain, and indefinite to enable the court to carry them out (*l*), or are subsidiary to the whole contract and the contract as a whole is incapable of specific performance (*m*). Nor will the court interfere by way of injunction when the contract, though negative in form, is affirmative in substance (*n*).

decline to import a negative covenant.

Contracts incapable of specific performance.

527. Nor will a negative covenant be implied and the breach thereof restrained, where the contract on the plaintiff's part being of such a nature as to be incapable of specific performance, is

(*h*) *Lumley* v. *Ravenscourt*, [1895] 1 Q. B. 683, C. A.; and see *Capes* v. *Hutton* (1826), 2 Russ. 357 (agreement by infant to grant a loan).

(*i*) *Clarke* v. *Price* (1819), 2 Wils. (CH.) 157; *Baldwin* v. *Society for Diffusing Useful Knowledge* (1838), 9 Sim. 393; *Pickering* v. *Ely* (*Bishop*) (1843), 2 Y. & C. Ch. Cas. 249; *Stocker* v. *Brocklebank* (1851), 3 Mac. & G. 250; *Johnson* v. *Shrewsbury and Birmingham Rail. Co.* (1853), 3 De G. M. & G. 914, C. A.; *Brett* v. *East India and London Shipping Co., Ltd.* (1864), 2 Hem. & M. 404; *Mair* v. *Himalaya Tea Co.* (1865), L. R. 1 Eq. 411; *Millican* v. *Sulivan* (1888), 4 T. L. R. 203, C. A.; *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416, C. A. (disapproving *Montague* v. *Flockton* (1873), L. R. 16 Eq. 189, where MALINS, V.-C., restrained an actor from performing at a rival theatre although there was no stipulation in terms that he would not do so); *Cochrane* v. *Exchange Telegraph Co.* (1896), 65 L. J. (CH.) 334 (where the contract related to a chattel coupled with personal service); see also *Thornton* v. *Kendall* (1863), 11 W. R. 352, C. A., and *Firth* v. *Ridley* (1864), 33 Beav. 516; such a covenant, though not absolutely and clearly negative in terms, is, however, as good as a negative covenant if it is sufficiently clear and definite to enable the court to see exactly what is not to be done (*Mutual Reserve Fund Life Association* v. *New York Life Assurance Co.* (1897), 75 L. T. 528, at p. 529; and see p. 243, *ante*). *Webster* v. *Dillon* (1857), 3 Jur. (N. S.) 432 (where an actor was restrained from acting elsewhere than at the plaintiff's theatre, although there was no express stipulation that he should not act elsewhere), must be regarded as overruled; see *Whitwood Chemical Co.* v. *Hardman*, *supra*, at p. 437, where *Webster* v. *Dillon*, *supra*, is referred to and passed over on the ground that it was not argued and that the defendant did not appear; compare, however, *Crisp* v. *Holden* (1910), 54 Sol. Jo. 784 (where the court granted an interim injunction to restrain the managers of a school from dismissing the headmaster until his employment should have been lawfully terminated). See also title EDUCATION, Vol. XII., pp. 125, 126.

(*j*) *Fothergill* v. *Rowland* (1873), L. R. 17 Eq. 132; see *Baldwin* v. *Society for Diffusing Useful Knowledge*, *supra*; but as to the case of a ship engaged under a charterparty, see p. 247, *post*.

(*k*) *Ryan* v. *Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116, C. A.; and see *Musgrave* v. *Horner* (1874), 31 L. T. 632 (where the court refused to grant a mandatory injunction to compel a tenant to perform a covenant on his part to keep the land in cultivation).

(*l*) *Paris Chocolate Co.* v. *Crystal Palace Co.* (1855), 3 Sm. & G. 119, 124; *De Mattos* v. *Gibson* (1859), 4 De G. & J. 276, 296; *Low* v. *Innes* (1864), 4 De G. J. & Sm. 286, 290; *Bernard* v. *Meara* (1861), 12 I. Ch. R. 389. The jurisdiction of the court is in an eminent degree discretionary, and ought to be guided and measured by what substantial justice requires between the parties (*Low* v. *Innes*, *supra*).

(*m*) *Paris Chocolate Co.* v. *Crystal Palace Co.*, *supra*; *Hamilton* v. *Dunsford* (1857), 6 I. Ch. R. 412, 416.

(*n*) *Davis* v. *Foreman*, [1894] 3 Ch. 654; *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413.

wholly executory (*o*), and in such a case a submission by the plaintiff specifically to perform his part is not sufficient (*p*).

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528. A vessel engaged under a charterparty is regarded as a chattel of peculiar value to the charterer; and, if a charterparty is *bonâ fide* entered into between the owner of the vessel and the charterer, the latter is entitled to an injunction to restrain the former from employing the vessel in a manner inconsistent with the charterparty (*q*).

Exception in case of vessels.

SUB-SECT. 5.—*Effect of Plaintiff's Conduct.*

529. The court takes into consideration the conduct of the party seeking the injunction. Relief will be refused if the plaintiff does not come to the court with clean hands (*r*). So, also, where one party to a contract containing mutual covenants fails to perform his part, the other party will not be restrained from committing a breach of a negative covenant on his part (*s*).

Conduct of plaintiff will be regarded.

The fact that the plaintiff has committed trifling breaches of covenant (*a*), or a trifling breach of another covenant which has caused no injury to anyone (*b*), or a breach of a covenant which is altogether of minor importance (*c*), will not, however, preclude him

What is not a bar to relief.

(*o*) *Peto* v. *Brighton, Uckfield and Tunbridge Wells Rail. Co.* (1863), 1 Hem. & M. 468.

(*p*) *Ibid.*

(*q*) *De Mattos* v. *Gibson* (1859), 4 De G. & J. 276, 299, discussed in *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416, 429, C. A.; and see *Herne Bay Steam Boat Co.* v. *Hutton*, [1903] 2 K. B. 683, 692, C. A.; *Sevin* v. *Deslandes* (1860), 30 L. J. (CH.) 457; *Messageries Imperiales* v. *Baines* (1863), 11 W. R. 322 (where the injunction was against purchasers of a ship with notice of the charterparty, to restrain them from interfering with the performance thereof); *Heriot* v. *Nicholas* (1864), 12 W. R. 844. According to *Sevin* v. *Deslandes*, *supra*, the owner is entitled to an injunction restraining the charterer from doing anything inconsistent with the charterparty. See also title SHIPPING AND NAVIGATION.

(*r*) *Stiff* v. *Cassell* (1856), 2 Jur. (N. S.) 348; *Maythorne* v. *Palmer* (1864), 11 Jur. (N. S.) 230; and see pp. 219 *et seq.*, *ante*. As to this principle generally, see title EQUITY, Vol. XIII., p. 70.

(*s*) *De Mattos* v. *Gibson*, *supra*; *Fechter* v. *Montgomery* (1863), 33 Beav. 22; *Telegraph Despatch and Intelligence Co.* v. *McLean* (1873), 8 Ch. App. 658; and see *Holmes* v. *Eastern Counties Rail. Co.* (1857), 3 K. & J. 675, 683; *Munro* v. *Wivenhoe and Brightlingsea Rail. Co.* (1865), 4 De G. J. & Sm. 723 733, C. A.; *Grimston* v. *Cuningham*, [1894] 1 Q. B. 125, *per* WILLS, J., at p. 130; *General Billposting Co., Ltd.* v. *Atkinson*, [1909] A. C. 118; *Measures Brothers, Ltd.* v. *Measures*, [1910] 2 Ch. 248, C. A. In *Fechter* v. *Montgomery*, *supra*, and *Telegraph Despatch and Intelligence Co.* v. *McLean*, *supra*, the negative covenants on the part of the defendant were implied; but see as to the former of these cases, *Whitwood Chemical Co.* v. *Hardman*, *supra*. Where, however, under an agreement containing mutual grants the plaintiffs have been put into possession of what was granted to them and have enjoyed it for several years, while the defendants have taken no steps to require the performance of the stipulation for their benefit, but have allowed the time to expire within which it should have been performed, an injunction will be granted at the suit of the plaintiffs to restrain the defendants from disturbing their enjoyment (*Great Northern Rail. Co.* v. *Lancashire and Yorkshire Rail. Co.* (1853), 1 Sm. & G. 81).

(*a*) *Besant* v. *Wood* (1879), 12 Ch. D. 605.

(*b*) *Western* v. *MacDermott* (1866), 2 Ch. App. 72, 75; *Richards* v. *Revitt* (1877), 7 Ch. D. 224; and see *Jackson* v. *Winnifrith* (1882), 47 L. T. 243.

(*c*) *Chitty* v. *Bray* (1883), 48 L. T. 860.

SECT. 4. Protection of Contractual Rights.

from obtaining an injunction (*d*); and, even if he has been guilty of misconduct in not strictly and honourably performing his part of the agreement, an injunction may be granted, where it is quite impossible in the circumstances of the case to estimate the damage to which he would be exposed if it was not granted (*e*).

Effect of acquiescence and delay.

530. The plaintiff may also lose his right to an injunction by acquiescence or delay (*f*), especially where a mandatory injunction is sought (*g*). Mere delay (*h*) by a plaintiff in taking steps to prevent the continuance of a breach of a restrictive covenant will not, however, amount to such acquiescence as to disentitle him to relief (*i*); but if he delays instituting his suit, notwithstanding the fact that the defendant is, to his knowledge (*k*), expending money in the erection or alteration of buildings (*l*), or if he acquiesces in the proceedings of the defendant (*m*), he will lose his right to an injunction. So a lessor or vendor, who permits some tenants or purchasers to commit breaches of restrictive covenants entered into for the benefit of all, will not be entitled to an injunction to restrain the other tenants or purchasers from infringing such covenants (*n*). Nor will relief be granted where there has been for a considerable time a violation of the agreement in respect of which relief is sought

(*d*) See *Besant* v. *Wood* (1879), 12 Ch. D. 605, *per* JESSEL, M.R., at pp. 627, 628.

(*e*) *Holmes* v. *Eastern Counties Rail. Co.* (1857), 3 K. & J. 675.

(*f*) *Scarisbrick* v. *Tunbridge* (1854), 3 Eq. Rep. 240; *Pollard* v. *Clayton* (1855), 1 K. & J. 462; *Hope* v. *Gloucester Corporation and the Charity Trustees* (1855), 1 Jur. (N. S.) 320; *Maythorne* v. *Palmer* (1864), 11 Jur. (N. S.) 230; and see p. 210, *ante*.

(*g*) See p. 216, *ante*.

(*h*) Different considerations apply in the case of *laches* where an ordinary right is interfered with, as in the case of nuisance, and the case where the plaintiff's right is founded on contract (*Price* v. *Bala and Festiniog Rail. Co.* (1884), 50 L. T. 787).

(*i*) *Northumberland* (*Duke*) v. *Bowman* (1887), 56 L. T. 773.

(*k*) But where the person entitled to insist upon the contract is unaware that expenditure is taking place on an erroneous construction of the contract, delay is immaterial (*Price* v. *Bala and Festiniog Rail. Co.*, *supra*, at p. 790).

(*l*) *Roper* v. *Williams* (1822), Turn. & R. 18, 23; *Johnstone* v. *Hall* (1856), 2 K. & J. 414, 425; *Eastwood* v. *Lever* (1863), 4 De G. J. & Sm. 114, 126, C. A.

(*m*) *Sayers* v. *Collyer* (1884), 28 Ch. D. 103, C. A.; and see *Osborne* v. *Bradley*, [1903] 2 Ch. 446, *per* FARWELL, J., at p. 451; but the fact that the plaintiff may have passively acquiesced in one breach of a covenant will not disentitle him to an injunction to restrain another breach (*Lloyd* v. *London, Chatham and Dover Rail. Co.* (1865), 34 L. J. (CH.) 401, C. A., *per* TURNER, L.J., at p. 405).

(*n*) *Roper* v. *Williams* (1822), Turn. & R. 18, *per* Lord ELDON, L.C. at p. 22; *Peek* v. *Matthews* (1867), L. R. 3 Eq. 515; and it makes no difference if such covenant is not only a covenant by each purchaser with the vendor, but also by each purchaser with all the others (*Peek* v. *Matthews*, *supra*); and see generally as to a vendor's right to enforce restrictive covenants and as to the right of purchasers of an estate sold in lots or under a building scheme to enforce, *inter se*, the observance of the restrictive covenants subject to which the property is sold, and the circumstances under which the right to relief in such cases may be lost through delay and acquiescence, titles EQUITY, Vol. XIII., p. 102; LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL. In cases of this kind, however, an injunction will not be refused where the breaches which have been permitted or acquiesced in are small or of minor importance (*Western* v. *MacDermott* (1866), 2 Ch. App. 72; *Richards* v. *Revitt* (1877), 7 Ch. D. 224; *Osborne* v. *Bradley*, [1903] 2 Ch. 446, 457; and see *Knight* v. *Simmonds*, [1896] 2 Ch. 294, C. A.).

by both the plaintiff and the defendant (*o*); and a man may by acquiescence lose not only his right to an injunction, but even his right to recover nominal damages (*p*).

SECT. 4. Protection of Contractual Rights.

SUB-SECT. 6.—*Injunction in Aid of Specific Performance.*

531. Pending a suit for specific performance, the court will grant an injunction to restrain the vendor from dealing with the property if there is a clear undisputed contract (*q*); but, if the contract is open to doubt, the question becomes one of comparative convenience, and an injunction will be granted or refused according to the side to which the balance of convenience inclines (*r*). Where, on an agreement for the sale of a house at a fixed price and the fixtures and furniture at a valuation to be made by a named person, permission to enter the premises for the purpose of making the valuation is refused by the vendor, a mandatory injunction may be granted to compel him to allow the entry to enable the valuation to proceed (*s*). So, also, a mandatory injunction in aid of specific performance may be had in a case where it is necessary for the preservation of the property sold, and what is necessary to be done can be done by the defendant at little inconvenience and small expense (*a*). A purchaser will not, however, be restrained at the suit of the vendor from purchasing an estate on the ground that he will be thereby rendered unable to perform his contract with the vendor (*b*).

In aid of specific performance.

SECT. 5.—*Injunction against Partners.*

532. The court will restrain a partner from violating the terms of his partnership contract, or acting inconsistently with his duties as a partner, both during the partnership, and whether or not dissolution is also sought, and also after dissolution (*c*). In the case, however, of a partnership determinable at will, the court will not usually interfere unless dissolution is also prayed;

Jurisdiction.

Partnership at will.

(*o*) *Sheard* v. *Webb* (1854), 2 W. R. 343.

(*p*) *Kelsey* v. *Dodd* (1881), 52 L. J. (CH.) 34.

(*q*) *Hadley* v. *London Bank of Scotland, Ltd.* (1865), 3 De G. J. & Sm. 63, C. A.; and see *Spiller* v. *Spiller* (1819), 3 Swan. 556; *Hart* v. *Herwig* (1873), 8 Ch. App. 860. In *Allgood* v. *Merrybent and Darlington Rail. Co.* (1886), 33 Ch. D. 571, the plaintiff, an unpaid vendor to a railway company, had obtained an order against the company, in an action to enforce his lien, that the defendants should on or before a named day pay the purchase-money, with a declaration that he was entitled to a lien and might on default of payment apply to enforce it, but the order contained no order of sale. On default of payment, there being evidence that the land was unsaleable, an injunction was granted to restrain the railway company from running trains over the railway or from continuing in possession of the land.

(*r*) *Hadley* v. *London Bank of Scotland, Ltd.*, *supra* (where, however, the injunction was refused); and see *Preston* v. *Luck* (1884), 27 Ch. D. 497, C. A. (where it was granted).

(*s*) *Smith* v. *Peters* (1875), L. R. 20 Eq. 511.

(*a*) *Strelley* v. *Pearson* (1880), 15 Ch. D. 113; and see R. S. C., Ord. 52, r. 3.

(*b*) *Syers* v. *Brighton Brewery Co., Ltd.*, *Wright* v. *Same* (1864), 11 L. T. 560. See, further, title SPECIFIC PERFORMANCE.

(*c*) See title PARTNERSHIP.

SECT. 5. Injunction against Partners.

for the defendant might immediately put an end to the partnership (*d*), though if the act complained of is one which tends towards the destruction of the partnership property, an injunction will be granted, notwithstanding the fact that dissolution is not prayed (*e*).

Misconduct which will induce the court to interfere.

533. To induce the court to interfere by injunction between partners a serious case of misconduct must be made out (*f*). Mere squabbles and improprieties arising from incompatibility of temper are insufficient (*g*).

A partner seeking relief must do equity.

534. A partner who complains that his co-partners do not do their duty towards him must be ready at all times and offer to do his duty towards them (*h*). Thus an application for an injunction to restrain the defendant from receiving or dealing with partnership property, founded on charges of misconduct, will be refused if the plaintiff has himself acted improperly (*i*).

Acquiescence.

The acquiescence of one partner in acts similar to that complained of may also disentitle him to relief against his co-partners (*k*).

Appointment of receiver.

535. The principles upon which the court acts in granting an injunction and appointing a receiver of the partnership property are distinct (*l*). The appointment of a receiver does, in fact, operate as an injunction (*m*), because the court will not allow its officer to be interfered with (*n*), and can grant an injunction to restrain such interference (*o*); but the appointment of a receiver operates to exclude all the partners from the management of the partnership affairs, whereas an injunction may be directed to some or one only of the partners, and therefore it does not follow that, because a receiver would be refused, an injunction, restraining one or more of the partners from doing what is complained of, would also be refused (*p*). Sometimes an injunction as well as a receiver will be granted for the purpose of marking the court's sense of the conduct of the parties who have misconducted themselves (*q*).

(*d*) *Peacock* v. *Peacock* (1809), 16 Ves. 49; *Miles* v. *Thomas* (1839), 9 Sim 606, 609.

(*e*) *Miles* v. *Thomas, supra* (where, however, the injunction was refused, there being no danger of the subject-matter in dispute being lost).

(*f*) See *Waters* v. *Taylor* (1808), 15 Ves. 10; and title PARTNERSHIP.

(*g*) See *Goodman* v. *Whitcomb* (1820), 1 Jac. & W. 589; *Marshall* v. *Colman* (1820), 2 Jac. & W. 266; *Smith* v. *Jeyes* (1841), 4 Beav. 503; *Anderson* v. *Anderson* (1857), 25 Beav. 190.

(*h*) *Const* v. *Harris* (1824), Turn. & R. 496, *per* Lord ELDON, L.C., at p. 524; and see *Smith* v. *Fromont* (1818), 2 Swan. 330.

(*i*) *Littlewood* v. *Caldwell* (1822), 11 Price, 97 (where the plaintiff had improperly taken away the partnership books).

(*k*) *Glassington* v. *Thwaites* (1823), 1 Sim. & St. 124, 131; and see *Powell* v. *Allarton* (1835), 4 L. J. (CH.) 91.

(*l*) See *Hall* v. *Hall* (1850), 3 Mac. & G. 79, 85; and generally, see title RECEIVERS.

(*m*) *Evans* v. *Coventry* (1854), 5 De G. M. & G. 911, 916, C. A.

(*n*) *Helmore* v. *Smith* (2) (1886), 35 Ch. D. 449, C. A.

(*o*) *Dixon* v. *Dixon*, [1904] 1 Ch. 161.

(*p*) *Hall* v. *Hall, supra.*

(*q*) *Evans* v. *Coventry* (1854), 3 Drew. 75, *per* KINDERSLEY, V.-C., at p. 82.

SECT. 6.—*Injunction against Mortgagors and Mortgagees* (*r*).

SECT. 6. Injunction against Mortgagors and Mortgagees.

536. Where sufficient grounds for relief are shown, the court can interfere to restrain an improper exercise by a mortgagee of his power of sale (*s*); but the court will not interfere with a mortgagee in the exercise *bonâ fide* of his power of sale, for the purpose of realising his debt and without collusion with the purchaser, even though the sale may be very disadvantageous, unless the price is so low as to be evidence of fraud (*t*).

Jurisdiction to restrain sale by mortgagee.

An injunction may be granted at the suit of the charterers from a mortgagor of a ship to restrain the registered mortgagees (who are out of possession) from dealing with the ship in any manner which may interfere with the execution of the charterparty, provided that it is not shown that the charterparty is in any way prejudicial to the sufficiency of the mortgagees' security (*a*), but, if the charterparty impairs their security, the mortgagees are not bound by it (*b*).

Mortgagee of ship.

A mortgagee can restrain a mortgagor in possession from committing such waste as would render the security insufficient (*c*).

Waste.

When a manor with an advowson appendant is mortgaged (*d*), an injunction may be granted at the suit of the mortgagor to restrain the mortgagee from presenting before foreclosure (*e*).

Mortgage of advowson.

537. A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee (*f*).

Injury to mortgaged property.

538. A mortgagor may be restrained by injunction from preventing the mortgagee from taking possession of the premises (*g*), or interfering with a receiver appointed by him (*h*).

Injunctions against mortgagor.

(*r*) As to grantors and grantees of bills of sale, see title BILLS OF SALE, Vol. III., pp. 65 *et seq.*

(*s*) *Whitworth* v. *Rhodes* (1850), 20 L. J. (CH.) 105; and see *Cockell* v. *Bacon* (1852), 16 Beav. 158. As to mortgagee's power of sale generally, see title MORTGAGE.

(*t*) *Warner* v. *Jacob* (1882), 20 Ch. D. 220; and see generally, as to the position and duties of a mortgagee exercising his power of sale and as to the circumstances under which and the principles upon which the court acts in restraining sales by mortgagees, title MORTGAGE.

(*a*) *Collins* v. *Lamport* (1864), 4 De G. J. & Sm. 500; *The Fanchon* (1880), 5 P. D. 173; *The Heather Bell*, [1901] P. 272, C. A.; see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 34, re-enacting the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 70; and title SHIPPING AND NAVIGATION.

(*b*) *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade*, [1905] 1 K. B. 815, C. A.; and see *The Heather Bell*, *supra*; *The Manor*, [1907] P. 339, C. A.

(*c*) *King* v. *Smith* (1843), 2 Hare, 239; *Harper* v. *Aplin* (1886), 54 L. T. 383.

(*d*) When a manor with an advowson appendant is mortgaged, the right to present is in the mortgagor until he is foreclosed (*Amhurst* v. *Dawling* (1700), 2 Vern. 401; *Gardiner* v. *Griffith* (1727), 2 P. Wms. 404); but if an advowson only is mortgaged the contrary appears to be the case (*Gardiner* v. *Griffith*, *supra*). See also title ECCLESIASTICAL LAW, Vol. XI., pp. 574, 595.

(*e*) *Amhurst* v. *Dawling*, *supra*.

(*f*) *Fairclough* v. *Marshall* (1878), 4 Ex. D. 37, C. A.; and this apart from the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5), which is an enabling, not a disabling section (*Fairclough* v. *Marshall*, *supra*, *per* BRETT, L.J., at p. 47).

(*g*) *Truman & Co.* v. *Redgrave* (1881), 18 Ch. D. 547.

(*h*) *Bayly* v. *Went* (1884), 51 L. T. 764; *Woolston* v. *Ross*, [1900] 1 Ch. 788

SECT. 6. Injunction against Mortgagors and Mortgagees.

A collateral term, entered into by the mortgagor with the mortgagee at the time of, and as one of the conditions of, the advance, which does not amount to a clog or fetter upon the equity of redemption (*i*), may, in a proper case, be enforced by means of an injunction (*k*).

Collateral term.

Equitable mortgagee.

539. An equitable mortgagee (*l*) by deposit of title deeds (*m*), a holder of a lien (*n*), or a mortgagee by assignment of an equitable chose in action (*o*), may respectively, if a proper case is made out, obtain an injunction for the purpose of preserving his securities (*p*).

SECT. 7.—*Injunction against Executors and Administrators.*

When granted to restrain getting in or disposing of deceased's estate.

540. If there is danger of the property of the deceased being lost owing to the insolvency (*a*) or bankruptcy (*b*) of an executor or administrator, or to the fact that he is about to leave the country (*c*), the court will grant an injunction restraining him from collecting and getting in the deceased's estate or from selling or disposing thereof and receiving the proceeds of sale (*d*). The mere fact that an executor is poor will not justify the court in interfering (*e*), but an injunction will be granted if he is a person of bad character, drunken habits, and great poverty (*f*).

Undue influence.

An executor claiming under a will and also by gift from the testator in his lifetime will, when the will and the gift are impeached, be restrained on motion from selling, if a case of undue influence is made out (*g*).

(*i*) As to clogs or fetters on the equity of redemption, and generally as to collateral terms and conditions of this kind, see titles EQUITY, Vol. XIII., pp. 91, 92; MORTGAGES.

(*k*) *Biggs* v. *Hoddinott*, *Hoddinott* v. *Biggs*, [1898] 2 Ch. 307, C. A.

(*l*) *Holroyd* v. *Marshall* (1862), 10 H. L. Cas. 191, 210, 212.

(*m*) *Whitbread* v. *Jordan* (1835), 1 Y. & C. (EX.) 303; *Meux* v. *Smith*, *Seager* v. *Smith* (1843), 7 Jur. 821.

(*n*) *Middleton* v. *Magnay* (1864), 2 Hem. & M. 233; and see *Gurnell* v. *Gardner* (1863), 4 Giff. 626; and as to a solicitor's lien on the papers of his client, see *Stedman* v. *Webb* (1839), 4 My. & Cr. 346; *Watson* v. *Lyon* (1855), 7 De G. M. & G. 288, C. A. As to lien in general, see title LIEN.

(*o*) See *Levinger* v. *Crombie* (1872), 21 W. R. 37. But the assignor is a necessary party (*ibid.*).

(*p*) *London and County Banking Co.* v. *Lewis* (1882), 21 Ch. D. 490, C. A.

(*a*) *Utterson* v. *Mair* (1793), 2 Ves. 95, 98; *Scott* v. *Becher* (1817), 4 Price, 346; *Mansfield* v. *Shaw* (1818), 3 Madd. 100; but see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 140.

(*b*) *Gladdon* v. *Stoneman* (1808), 1 Madd. 142, n.; *Bowen* v. *Phillips*, [1897] 1 Ch. 173.

(*c*) *Colebourne* v. *Colebourne* (1876), 1 Ch. D. 690; and see *Scott* v. *Becher*, *supra*.

(*d*) See also *Harrison* v. *Cockerell* (1817), 3 Mer. 1. An executor *de son tort* may be restrained from parting with assets in a proper case (*Re Lovett*, *Ambler* v. *Lindsay* (1876), 3 Ch. D. 198; *Brand* v. *Mitson* (*otherwise Brand*) (1876), 24 W. R. 524). The court will not restrain the agent in England of the administrator of a deceased trader in a foreign country from sending over the intestate's money and effects to that country, when the intestate's estate is the subject of a suit there (*Wallace* v. *Campbell* (1840), 4 Y. & C. (EX.) 167). See also, generally, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 140.

(*e*) *Hathornthwaite* v. *Russel* (1741), 2 Atk. 126; *Howard* v. *Papera* (1815), 1 Madd. 142 (cases of receivers).

(*f*) *Everett* v. *Prythergch* (1841), 12 Sim. 363, 365, 367.

(*g*) *Edmunds* v. *Bird* (1813), 1 Ves. & B. 542.

SECT. 7. Injunction against Executors and Administrators.

To induce the court to grant an injunction restraining an executor or administrator from parting with assets, without making provision for a future contingent liability, a case of past or probable misapplication of the assets must be made out (*h*); but where the liability is certain, though payable *in futuro*, it must be provided for (*i*).

Contingent liabilities.

An executor may be restrained at the suit of a co-executor from intermeddling in an estate and dealing with the property before probate (*k*). An injunction cannot be granted against executors in respect of acts, not being continuing acts within the Civil Procedure Act, 1833 (*l*), committed by their testator (*m*).

Before probate.

SECT. 8.—*Injunction against Trustees.*

Jurisdiction.

541. The court will restrain a trustee (*n*) from using the powers, which the trust may confer upon him at law, otherwise than for the legitimate purposes of the trust (*o*). The jurisdiction of the court in this respect is founded, not upon the irremediable consequences which would result from the act complained of, but upon the breach of trust itself (*p*).

Who may sue.

One of several *cestuis que trustent* may sue and obtain an injunction to restrain a breach of trust (*q*). The smallness of his interest, and the fact that he is an infant, and that the suit may have been instituted with other motives, are not reasons for depriving him of his remedy (*r*). A trustee can and ought to apply for an injunction to restrain a breach of trust by a co-trustee (*s*).

(*h*) *Read* v. *Blunt* (1832), 5 Sim. 567; and see *Norman* v. *Johnson* (1860), 29 Beav. 77; *Burrell* v. *Delevante* (1862), 30 Beav. 550; *King* v. *Malcott* (1852), 9 Hare, 692; *Re King, Mellor* v. *South Australian Land Mortgage and Agency Co.*, [1907] 1 Ch. 72.

(*i*) *King* v. *Malcott*, *supra*, at p. 694; *Atkinson* v. *Grey* (1853), 1 Sm. & G. 577; *Robinson's Executor's Case* (1856), 6 De G. M. & G. 572, C. A., *per* KNIGHT BRUCE, L.J., at p. 578; and as to the circumstances in which executors or administrators may be required to set aside sums to meet contingent debts and liabilities, and generally as to their powers and duties in this respect, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 255.

(*k*) *In the Goods of Moore* (1888), 13 P. D. 36. Unless litigation is pending in another division, the application may be made in the Chancery Division (*Re Green, Green* v. *Knight*, [1895] W. N. 69; *Salter* v. *Salter*, [1896] P. 291, C. A.; explaining *Re Parker, Dearing* v. *Brooks* (1885), 54 L. J. (CH.) 694); and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 201, 202. In *In the Goods of Cassidy, Cassidy* v. *Foley*, [1904] 2 I. R. 427, an injunction was granted *ex parte*, at the suit of the sole next of kin of a deceased tenant to restrain the landlord from interfering with the tenant's assets pending administration.

(*l*) 3 & 4 Will. 4, c. 42, s. 2.

(*m*) *Kirk* v. *Todd* (1882), 21 Ch. D. 484, 487; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 312, 314.

(*n*) See also titles RECEIVERS; TRUSTS AND TRUSTEES.

(*o*) *Balls* v. *Strutt* (1841), 1 Hare, 146; *M'Fadden* v. *Jenkyns* (1842), 1 Ph. 153.

(*p*) *A.-G.* v. *Liverpool Corporation* (1835), 1 My. & Cr. 171, 210; *A.-G.* v. *Aspinall* (1837), 2 My. & Cr. 613; *A.-G.* v. *De Winton*, [1906] 2 Ch. 106, 116; and see *Anon.* (1821), Madd. & G. 10. *Pechel* v. *Fowler* (1758), 2 Anst. 549 (where an injunction was refused on the ground that irreparable injury was not shown and that the trustees would be answerable to the plaintiffs for damage sustained) is not consistent with the later authorities.

(*q*) *Dance* v. *Goldingham* (1873), 8 Ch. App. 902; R. S. C., Ord. 16, rr. 36, 37.

(*r*) *Dance* v. *Goldingham*, *supra*.

(*s*) *Re Chertsey Market, Ex parte Walthew* (1819), 6 Price, 261, 279.

SECT. 8. **Injunction against Trustees.**

In an action to restrain a sale (*t*) which is being conducted in such a manner as to constitute a breach of trust, an injunction may be granted restraining both the trustees and the purchaser from completing (*a*). So, also, in a proper case trustees may be restrained from selling trust property, if it can be shown that a sale would be detrimental to the interest of the *cestuis que trustent* (*b*).

To restrain sale.

Contempt.

If an injunction is granted against trustees, and new trustees are appointed for the purpose of avoiding the order and, with knowledge of the order, do what is forbidden by it, they may be committed for contempt (*c*).

Trustees for religious purposes.

542. Trustees in whom the right of presenting a minister of a parish is vested by deed, in trust for the parishioners, may be restrained from presenting to the bishop a minister who has been improperly elected (*d*). So also, where a pastor has been improperly dismissed, the governing body of a church or chapel may, in a proper case, be restrained from interfering with or hindering him in the due exercise of his office (*e*).

An injunction may also be granted at the suit of the majority of the trustees of a chapel restraining a person improperly claiming to be the pastor of the chapel, and also the minority of the trustees, from disturbing the majority in the management of the chapel (*f*).

SECT. 9.—*Prevention of Disclosure of Confidential Information.*

Where injunction granted.

543. An injunction will be granted to restrain a person in a confidential position from disclosing information with which he became acquainted through that relation (*g*). Thus a man may

(*t*) As to a trustee's power to sell subject to depreciatory conditions, see the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 14. Trustees for sale will not be restrained from completing on the ground that they cannot show a good title (*Roberts* v. *Bozon* (1825), 3 L. J. (o. s.) (CH.) 113).

(*a*) *Dance* v. *Goldingham* (1873), 8 Ch. App. 902; but not where they are selling at the request and by the direction of the tenant for life, on merely speculative evidence, adduced by the remaindermen objecting to an immediate sale, of an expected future increase in the value of the property (*Thomas* v. *Williams* (1883), 24 Ch. D. 558).

(*b*) *Wiles* v. *Gresham* (1853), 1 W. R. 514; and see *Marshall* v. *Sladden* (1849), 7 Hare 428.

(*c*) *Avory* v. *Andrews* (1882), 30 W. R. 564.

(*d*) *Carter* v. *Cropley* (1857), 8 De G. M. & G. 680, C. A.; an injunction will also be granted to restrain a curate who has been improperly elected from performing divine service and officiating as curate (*A.-G.* v. *Powis* (*Earl*) (1853), Kay, 186); and see p. 226, *ante*, and titles CHARITIES, Vol. IV., p. 252; ECCLESIASTICAL LAW, Vol. XI., pp. 564, 580.

(*e*) *Daugars* v. *Rivaz* (1860), 28 Beav. 233; and see *Dean* v. *Bennett* (1870), L. R. 9 Eq. 625; title ECCLESIASTICAL LAW, Vol. XI., p. 816.

(*f*) *Perry* v. *Shipway* (1859), 4 De G. & J. 353, C. A.; and see generally, as to the jurisdiction of the court to restrain the election of an improper person as minister or to restrain a minister who has been dismissed or improperly elected from acting, titles CHARITIES, Vol. IV., p. 254; ECCLESIASTICAL LAW, Vol. XI., p. 815.

(*g*) *Evitt* v. *Price* (1827), 1 Sim. 483; *Morison* v. *Moat* (1851), 9 Hare, 241, 255; *Gartside* v. *Outram* (1856), 3 Jur. (N. S.) 39, 40; but not if the communication relates to fraudulent transactions (*Gartside* v. *Outram*, *supra*). As to restraining the delivery of letters, see pp. 269, 270, *post*.

SECT. 9. Prevention of Disclosure of Confidential Information.

be restrained from making an improper use of (*h*), or from disclosing or communicating (*i*), information obtained by him in the course of his employment (*k*).

In restraining an employee from making use of or communicating confidential information which he has gained in the course of his employment, the court rests its jurisdiction upon the ground of implied contract and breach of trust or confidence (*l*). Jurisdiction.

544. Not only persons who have acquired the information direct, but others to whom they have communicated it, will be restrained in a proper case from making use of the information so acquired (*m*). Third parties.

A motion to restrain the disclosure of confidential communications will be heard in private, where a public hearing would defeat the object of an action brought by the plaintiff (*n*). Hearing in private.

SECT. 10.—*Protection of Copyright and Literary Property* (*o*).

545. An injunction may be granted in a proper case to restrain the infringement of copyright (*p*). Where the Copyright Acts (*o*) Jurisdiction.

(*h*) *Yovatt* v. *Winyard* (1820), 1 Jac. & W. 394; *Morison* v. *Moat* (1851) 9 Hare, 241; *Robb* v. *Green*, [1895] 2 Q. B. 315, C. A.; *Lamb* v. *Evans*, [1893] 1 Ch. 218, C. A.; compare *Stuart and Simpson* v. *Halstead* (1911), 131 L. T. Jo. 148, 149. See also title COPYRIGHT AND LITERARY PROPERTY, VOL. VIII., pp. 190, 193. As to restraining the publication of photographs without the plaintiff's consent by interim injunction, see *Corelli* v. *Wall* (1906), 22 T. L. R. 532.

(*i*) *Tipping* v. *Clarke* (1847), 8 L. T. (o. s.) 554; *Lewis* v. *Smith* (1849), 1 Mac. & G. 417; *Morison* v. *Moat supra*; *Williams* v. *Prince of Wales Life etc. Co.* (1857), 23 Beav. 338; *Merryweather* v. *Moore*, [1892] 2 Ch. 518. Where a merchant gets information of the affairs of his agent not connected with his own transactions, and threatens by letter to disclose the information, the court will not interfere upon the mere production of the letter. Further evidence of fraud in procuring, and intention to act upon the information, must be produced (*Tipping* v. *Clarke*, *supra*).

(*k*) See also titles MASTER AND SERVANT; SOLICITORS.

(*l*) *Tipping* v. *Clarke*, *supra*; *Morison* v. *Moat*, *supra*; *Tuck & Sons* v. *Priester* (1887), 19 Q. B. D. 629, C. A.; *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345; *Merryweather* v. *Moore*, *supra*; *Lamb* v. *Evans*, [1893] 1 Ch. 218, C. A.; *Robb* v. *Green*, *supra*; and see *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413, 422, where EVE, J., stated that the real principle upon which the court acted was that of implied contract. Different grounds have, however, been assigned for the exercise of the jurisdiction. In some cases it has been referred to property, in others to contract, and in others again it has been treated as founded upon breach of trust or confidence; but upon whatever grounds the jurisdiction is founded there is no doubt as to its exercise (*Morison* v. *Moat*, *supra*, *per* TURNER, V.-C., at p. 255; *Robb* v. *Green*, *supra*, *per* KAY, L.J., at p. 319; and see *Albert* (*Prince*) v. *Strange* (1849), 1 Mac. & G. 25, 44). In *Yovatt* v. *Winyard*, *supra*, the jurisdiction was based on breach of trust and confidence; and see *Beer* v. *Ward* (1821), Jac. 77 (where the injunction was refused); and *Philip* v. *Pennell*, [1907] 2 Ch. 577, 587. In *Lewis* v. *Smith*, *supra*, and *Williams* v. *Prince of Wales Life etc. Co.*, *supra*, the grounds are not stated.

(*m*) *Lewis* v. *Smith*, *supra*; *Morison* v. *Moat*, *supra*; *Russell* v. *Jackson* (1851), 9 Hare, 387, 390; *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q. B. 147, C. A.; and see *Tipping* v. *Clarke* (1843), 2 Hare, 383, 393; *Albert* (*Prince*) v. *Strange*, *supra*, at p. 45; *Exchange Telegraph Co., Ltd.* v. *Central News, Ltd.*, [1897] 2 Ch. 48; *Summers* (*William*) *& Co., Ltd. v. Boyce and Kinmond & Co.* (1907), 97 L. T. 505.

(*n*) *Mellor* v. *Thompson* (1885), 31 Ch. D. 55, C. A.

(*o*) See title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 135 *et seq.*

(*p*) See *ibid.*, p. 165; and as to restraining improper reproduction of drawings and photographs, *ibid.*, pp. 190 *et seq.*; and *Carlton Illustrators* v. *Coleman & Co.*,

SECT. 10. Protection of Copyright and Literary Property.

create a new offence and enact a particular penalty, the jurisdiction of the court by way of injunction is not thereby excluded (*q*).

When injunction will be granted.

546. The court is less disposed to grant an interlocutory injunction when the work in question is of a transitory nature (*a*).

Where the conduct of the party applying for the injunction has led to the state of things which occasions the application, an interlocutory injunction will frequently be refused (*b*); and not only the plaintiff's conduct with the party with whom he is at contest, but his conduct with others, may influence the court in the exercise of its discretion (*c*). Nor will an injunction be granted at the suit of the publisher of a book containing pirated (*d*), immoral, blasphemous, or seditious matter (*e*).

When amount taken small in quantity.

If the pirated matter forms but a very inconsiderable part of the plaintiff's work, the question whether or not there was an *animus furandi* will be a material consideration for the court in exercising its discretion as to granting an injunction (*f*).

Sale of work not allowed after injunction granted.

547. Where an injunction is granted the defendant will not be allowed to sell copies already printed, he keeping an account, unless the plaintiff consents (*g*). Nor where the injunction is against a work which is proposed to be published in successive numbers, on the ground of piracy in the published numbers, will it be modified, so as to permit the publication of future numbers, while the question of piracy remains undecided (*h*).

Scope of injunction.

548. When it has once been ascertained that the defendant has in any way violated the right of the plaintiff, the nature and extent

[1911] 1 K. B. 771; *Bowden Brothers* v. *Amalgamated Pictorials, Ltd.*, [1911] 1 Ch. 386. The fact that the plaintiff appears to have a good equitable title affords a sufficient ground for granting an interlocutory injunction (*Oxford and Cambridge (Universities)* v. *Richardson* (1802), 6 Ves. 689, 706; *Mawman* v. *Tegg* (1826), 2 Russ. 385; *Sweet* v. *Cater* (1841), 11 Sim. 572; and see p. 217, *ante*). In *Andrew* v. *Raeburn* (1874), 31 L. T. 73, C. A., an interlocutory injunction was granted, although the plaintiff had not fully proved his title to relief, on the ground that to refuse it would be to determine the whole suit on an interlocutory application. A mere agent for sale has not sufficient interest to enable him to obtain an injunction (*Nicol* v. *Stockdale* (1785), 3 Swan. 687).

(*q*) *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501, 506; see *Russell* v. *Smith* (1846), 15 Sim. 181; *Carlton Illustrators* v. *Coleman & Co.*, [1911] 1 K. B. 771.

(*a*) *Matthewson* v. *Stockdale* (1806), 12 Ves. 270, 275.

(*b*) *Rundell* v. *Murray* (1821), Jac. 311, 316.

(*c*) *Rundell* v. *Murray*, *supra*; *Saunders* v. *Smith* (1838), 3 My. & Cr. 711, 730; and see, as to the effect of delay in applying, title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 166.

(*d*) *Cary* v. *Faden* (1799), 5 Ves. 23.

(*e*) See title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 144.

(*f*) *Moffat and Paige, Ltd.* v. *Gill & Sons, Ltd. and Marshall* (1901), 49 W. R. 438 (where *animus furandi* was not established and the injunction was refused); and see *Jarrold* v. *Houlston* (1857), 3 K. & J. 708, 722 (where *animus furandi* was established and the injunction granted); *Spiers* v. *Brown* (1858), 6 W. R. 352, 353 (where the injunction was refused). Where the defendant denies copying, he should produce his original manuscript (*Spiers* v. *Brown*, *supra*; *Hotten* v. *Arthur* (1863), 1 Hem. & M. 603, 609). See further, for the reasons which may incline the court to refuse an injunction, title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 146 *et seq.*, and *ibid.*, pp. 164—166.

(*g*) *Sweet* v. *Maugham* (1840), 11 Sim. 51.

(*h*) *Barfield* v. *Nicholson* (1824), 2 L. J. (O. S.) (CH.) 90.

of the injunction will depend upon the circumstances (*i*). When the court can ascertain exactly what portions of the work are pirated, the injunction will be limited to those specific portions (*k*); but when the pirated matter is considerable in extent, an injunction may be granted to restrain the publication of the work containing any pirated parts generally, without waiting till all the parts which have been pirated can be distinctly specified (*l*). Where the pirated part of the work cannot be separated from the original part (*m*), or is so very considerable and mixed up with the smaller part of the work that, when taken away, there is nothing left to publish (*n*), the injunction, although confined to the pirated parts only, is in effect an injunction against the whole work (*o*).

Before publication.

549. In the absence of satisfactory evidence of the actual contents of a work which has not yet been published, an injunction will not be granted on evidence as to the mode of preparation which the defendant is adopting (*a*).

Protection of property in unpublished writings.

550. The jurisdiction of the court to restrain the publication of unpublished matter (*b*) does not depend solely upon the question of property, but upon the principle of preventing breaches of trust, confidence or contract (*c*). The application for an injunction should be made early, before the expense of printing has been incurred (*d*). If the case is a proper one for an injunction, the plaintiff will be entitled to his remedy, whether or not he intends to make a profit by the publication (*e*).

(*i*) *Lewis* v. *Fullarton* (1839), 2 Beav. 6, 10, 11.

(*k*) *Jarrold* v. *Houlston* (1857), 3 K. & J. 708; see *Low* v. *Ward* (1868), L. R. 6 Eq. 415; *Morris* v. *Ashbee* (1868), L. R. 7 Eq. 34; and for form of injunction, see *Smith* v. *Chatto* (1874), 23 W. R. 290.

(*l*) *Lewis* v. *Fullarton, supra; Kelly* v. *Morris* (1866), L. R. 1 Eq. 697; see *Morris* v. *Ashbee, supra*, at p. 41; *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444, 458; but compare *Mawman* v. *Tegg* (1826), 2 Russ. 385, 398 (to the effect that, before an injunction is granted against the whole work, the court should first ascertain what is the quantity of matter pirated); *Jarrold* v. *Houlston, supra*, at p. 722 (to the effect that no labour should be grudged in order to ascertain how far the injunction should extend).

(*m*) *Mawman* v. *Tegg, supra*, at p. 390.

(*n*) *Ibid.*, at p. 397.

(*o*) See *Lewis* v. *Fullarton, supra; Kelly* v. *Morris, supra; Morris* v. *Ashbee, supra; Hogg* v. *Scott, supra.*

(*a*) *Morris* v. *Wright* (1870), 5 Ch. App. 279.

(*b*) See title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 136 *et seq.* As to restraining publication of a report of proceedings which a particular person has been authorised to publish, see *Gurney* v. *Longman* (1807), 13 Ves. 493.

(*c*) *Queensberry* (*Duke*) v. *Shebbeare* (1758), 2 Eden, 329; *Albert* (*Prince*) v. *Strange* (1849), 1 Mac. & G. 25, 44, 48; *Turner* v. *Robinson* (1860), 10 I. Ch. R. 121, 510, C. A.; *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345, 354; see *Abernethy* v. *Hutchinson* (1825), 3 L. J. (o. s.) (CH.) 209; *Mayall* v. *Higbey* (1862), 1 H. & C. 148; *Mansell* v. *Valley Printing Co.*, [1908] 1 Ch. 567; applied in *Bowden Brothers* v. *Amalgamated Pictorials, Ltd.*, [1911] 1 Ch. 386.

(*d*) *Thompson* v. *Stanhope* (1774), 2 Amb. 737, 739; *Gee* v. *Pritchard* (1818), 2 Swan. 402, 425.

(*e*) *Southey* v. *Sherwood* (1817), 2 Mer. 435, *per* Lord ELDON, L.C., at p. 437.

SECT. 11. Protection of Patent Rights.

SECT. 11.—*Protection of Patent Rights.*

General principle.

551. In an action to restrain the infringement of a patent (*f*), a perpetual injunction (*g*) will be granted when the validity of the patent and the fact of the infringement are established (*h*), if there is a probability of the infringement being repeated (*i*); but, where an interlocutory injunction is sought, if any doubt exists as to the validity of the patent or the fact of its infringement, the question whether or not the injunction will be granted depends upon the degree of doubt which exists and the balance of convenience (*k*).

Perpetual injunction.

An injunction cannot be granted in respect of a patent which has expired (*l*). So also when an action is brought immediately before the expiration of a patent, an injunction will, as a general rule, be refused (*m*).

Suspending the injunction pending an appeal.

The operation of the injunction may be stayed pending an appeal (*n*); but, as a general rule, an application for this purpose will be refused (*o*), even where a stay would be for the benefit of the public (*p*). Where the injunction is stayed the defendant is usually required to keep an account (*q*), or give security (*r*), and to enter the appeal forthwith (*s*).

Threats action.

552. If a person claiming to be the patentee of an invention, by circular, advertisements, or otherwise threatens any other person

(*f*) As to patents generally, see title PATENTS.

(*g*) Generally as to the principles upon which the court acts in granting relief by way of injunction in patent cases, see title PATENTS.

(*h*) *Bridson* v. *M'Alpine* (1845), 8 Beav. 229.

(*i*) *Proctor* v. *Bayley* (1889), 42 Ch. D. 390, C. A.; see *Lyon* v. *Newcastle-upon-Tyne Corporation* (1894), 11 R. P. C. 218. Where a patent is infringed the patentee has a *primâ facie* case for an injunction, for it is to be presumed that an infringer intends to go on infringing, and also, where there has not been any infringement but an intention to infringe is shown, an injunction will be granted (*Proctor* v. *Bayley, supra, per* COTTON, L.J., at p. 398; and see *Dunlop Pneumatic Tyre Co.* v. *Neal*, [1899] 1 Ch. 807).

(*k*) *Bridson* v. *M'Alpine, supra; Shillito* v. *Larmuth & Co.* (1884), 2 R. P. C. 1; and see *Challender* v. *Royle* (1887), 4 R. P. C. 363, 372, C. A.; see also *Bacon* v. *Jones* (1839), 4 My. & Cr. 433 (where the principles and practice of the court in granting injunctions in patent cases upon interlocutory motion and the hearing are discussed).

(*l*) *Saccharin Corporation, Ltd.* v. *Quincey*, [1900] 2 Ch. 246, 249.

(*m*) *Betts* v. *Gallais* (1870), L. R. 10 Eq. 392; see *Welsbach Incandescent Gas Light Co., Ltd.* v. *New Incandescent (Sunlight Patent) Gas Lighting Co., Ltd.* (1900), 17 R. P. C. 237, 254; but compare *Crossley* v. *Beverley* (1829), 1 Russ. & M. 166, n. (where a defendant, who had a large stock of pirated articles ready to be thrown on the market as soon as the patent expired, was restrained).

(*n*) *Kaye* v. *Chubb & Sons* (1886), 4 R. P. C. 23; *Ducketts, Ltd.* v. *Whitehead* (1895), 12 R. P. C. 187, 191.

(*o*) See *Otto* v. *Steel* (1886), 3 R. P. C. 109, 121, C. A.; *Proctor* v. *Bennis* (1887), 4 R. P. C. 333, 363, C. A.; and see *National Opalite Glazed Brick and Tile Syndicate, Ltd.* v. *Ceralite Syndicate, Ltd.* (1896), 13 R. P. C. 649, 658.

(*p*) *Lyon* v. *Goddard* (2) (1893), 10 R. P. C. 348, C. A. In *Hopkinson* v. *St. James and Pall Mall Electric Light Co., Ltd.* (1893), 10 R. P. C. 46, the operation of the injunction was stayed by agreement on the ground of public convenience; and see p. 211, *ante*.

(*q*) *Kaye* v. *Chubb & Sons, supra*.

(*r*) *National Opalite Glazed Brick and Tile Syndicate, Ltd.* v. *Ceralite Syndicate, Ltd., supra*.

(*s*) See also *Hopkinson* v. *St. James and Pall Mall Electric Light Co., Ltd., supra; Ducketts, Ltd.* v. *Whitehead, supra*.

with legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved may obtain an injunction against the continuance of such threats, and may recover damages, if the alleged infringement is not, in fact, an infringement, unless the person making such threats with due diligence commences and prosecutes an action for infringement of his patent (*a*).

SECT. 12.—*Protection of Trade Marks.*

Jurisdiction: infringement of trade marks.

553. The jurisdiction of the court in the protection given to trade marks (*b*) rests upon property, and the court interferes by injunction, because that is the only mode by which property of this kind can be effectually protected. The court acts upon the same principles in granting relief by way of injunction in the case of the infringement of the right to a trade mark as in the case of the violation of any other right of property (*c*).

Passing off.

It is a fundamental rule that no man has a right to put off his goods for sale as the goods of a rival trader (*d*), and he cannot, therefore, be allowed to use names, marks, letters or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person (*e*); and, if he attempts to do so or to make use of another mark, so resembling such trade mark that persons, purchasing with ordinary caution, are likely to be misled, the court will restrain him from so doing (*f*). An injunction may also be granted to restrain a printer from printing and selling imitations of the plaintiffs' trade labels (*g*).

No threats action.

There is no action for threats (*h*) in the case of trade marks as in the case of patents (*i*).

(*a*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 36, re-enacting the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 32; and see *Household and Rosher* v. *Fairburn and Hall* (1885), 2 R. P. C. 140; *Driffield and East Riding Pure Linseed Cake Co.* v. *Waterloo Mills Cake and Warehousing Co.* (1886), 31 Ch. D. 638; and title PATENTS. As to what constitutes a breach of an injunction restraining threats of legal proceedings or liability, see *Ellam* v. *Martyn & Co.* (1898), 68 L. J. (CH.) 123, C. A.

(*b*) As to what constitutes a trade mark and as to the necessity of registering trade marks and the law relating to them generally, see title TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*c*) *Leather Cloth Co., Ltd.* v. *American Leather Cloth Co., Ltd.* (1863), 4 De G. J. & Sm. 137, 142; (1865), 11 H. L. Cas. 523.

(*d*) *Leather Cloth Co., Ltd.* v. *American Leather Cloth Co., Ltd.* (1865), 11 H. L. Cas. 523, *per* Lord KINGSDOWN, at p. 538.

(*e*) *Perry* v. *Truefitt* (1842), 6 Beav. 66, *per* Lord LANGDALE, M.R., at p. 72; *Ash* (*Claudius*), *Son & Co., Ltd.* v. *Invicta Manufacturing Co., Ltd.* (1911), 55 Sol. Jo. 348; but compare *Edge* (*W.*) *& Sons, Ltd.* v. *Niccolls* (*W.*) *& Sons, Ltd.*, [1911] 1 Ch. 5, C. A. (where the "get-up" of an article was copied); *Outram* (*George*) *& Co., Ltd.* v. *London Evening Newspapers Co., Ltd.* (1911), 27 T. L. R. 231.

(*f*) *Gout* v. *Aleploglu* (1833), 6 Beav. 69, n.; *Knott* v. *Morgan* (1836), 2 Keen, 213; *Glenny* v. *Smith* (1865), 2 Drew. & Sm. 476; *Seixo* v. *Provezende* (1866), 1 Ch. App. 192; *Somerville* v. *Schembri* (1887), 12 App. Cas. 453, P. C.; *Birmingham Vinegar Brewery Co.* v. *Powell*, [1897] A. C. 710; *Outram* (*George*) *& Co. Ltd.*, v. *London Evening Newspapers Co., Ltd.*, *supra*.

(*g*) *Farina* v. *Silverlock* (1855), 1 K. & J. 509.

(*h*) See *supra*.

(*i*) *Colley* v. *Hart* (1888), 6 R. P. C. 17.

SECT. 13. **Prevention of Libellous Statements.**

Jurisdiction.

SECT. 13.—*Prevention of Libellous Statements* (*j*).

554. The court has jurisdiction to restrain the publication of a libel (*k*), or the making of slanderous statements (*l*) calculated to injure a man in his trade or business (*m*), even though no damage has actually accrued, if it is imminent and the natural and direct result likely to follow (*n*), as well as to restrain the publication of a mere personal libel (*o*). In a proper case the publication of a libel may be restrained on an interlocutory application (*p*); but this jurisdiction will only be exercised in the clearest cases; where any jury would say that the matter complained of was libellous, and, if the jury did not so find, the court would set aside the verdict as unreasonable (*q*). So, too, the court will refuse an

(*j*) As to what statements are actionable, and generally on the subject of libel and slander, see title LIBEL AND SLANDER. As to libellous statements at elections, see title ELECTIONS, Vol. XII., pp. 298, 540. For threats actions in the case of patents, see p. 258, *ante*, and title PATENTS. Prior to the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8), the court had no jurisdiction to restrain the publication of a libel as such even if it was injurious to property (*Prudential Assurance Co.* v. *Knott* (1875), 10 Ch. App. 142).

(*k*) *Saxby* v. *Easterbrook* (1878), 3 C. P. D. 339; *Thorley's Cattle Food Co.* v. *Massam* (1880), 14 Ch. D. 763, C. A.; *Thomas* v. *Williams* (1880), 14 Ch. D. 864; *Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (1882), 20 Ch. D. 501, C. A.; *Hayward & Co.* v. *Hayward & Sons* (1886), 34 Ch. D. 198; *Bonnard* v. *Perryman*, [1891] 2 Ch. 269, C. A.; *Collard* v. *Marshall*, [1892] 1 Ch. 571; *Lee* v. *Gibbings*, (1892), 67 L. T. 263; *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud*, [1894] 1 Q. B. 671, C. A.; *London and Northern Bank, Ltd.* v. *George Newnes, Ltd.* (1899), 16 T. L. R. 76; and see *James* v. *James* (1872), L. R. 13 Eq. 421. In *Fisher & Co.* v. *Apollinaris Co.* (1875), 10 Ch. App. 297, where the offender in a trade mark case was acquitted, no evidence being offered against him and he giving a letter of apology with authority to the prosecutors to make such use of it as they might think fit, and they published the letter by advertisement for two months, the court declined to restrain them from continuing to publish it.

(*l*) *Hermann Loog* v. *Bean* (1884), 26 Ch. D. 306, C. A. There is more difficulty in granting an injunction in the case of spoken words than in the case of written statements, and the jurisdiction must therefore be exercised with great caution; but if definite statements are proved to have been made an injunction will, in a proper case, be granted to restrain the repetition thereof. If necessary a mandatory injunction may also be granted (*ibid.*).

(*m*) The court will also restrain the issue of misleading trade circulars; see *Harper* v. *Pearson* (1860), 3 L. T. 547; *Stevens* v. *Paine* (1868), 18 L. T. 600. See also *Scott* v. *Scott* (1866), 16 L. T. 143; and generally, title LIBEL AND SLANDER.

(*n*) *Dunlop Pneumatic Tyre Co., Ltd.* v. *Maison Talbot etc.* (1904), 52 W. R. 254.

(*o*) See *Poulett* v. *Chatto and Windus*, [1887] W. N. 192; *Salomons* v. *Knight*, [1891] 2 Ch. 294, C. A.; *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud*, *supra*, *per* Lord HALSBURY and DAVEY, L.J., at pp. 690, 698.

(*p*) *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, *supra*; *Poulett* v. *Chatto and Windus*, *supra*; *Bonnard* v. *Perryman*, *supra*; *Collard* v. *Marshall*, *supra*; *Trollope* v. *London Building Trades Federation*, [1895] W. N. 29; *London and Northern Bank, Ltd.* v. *George Newnes, Ltd.*, *supra*.

(*q*) *Coulson & Sons* v. *Coulson & Co.* (1887), 3 T. L. R. 846, C. A.; *Liverpool Household Stores Association* v. *Smith* (1887), 37 Ch. D. 170, C. A.; *Bonnard* v. *Perryman*, *supra*, at p. 284; *Champion & Co., Ltd.* v. *Birmingham Vinegar Brewery Co., Ltd.* (1893), 10 T. L. R. 164; *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud*, *supra*; *Newton* v. *Amalgamated Musicians' Union* (1896), 12 T. L. R. 623; *Lloyd's Bank, Ltd.* v. *Royal British Bank, Ltd.* (1903), 19 T. L. R. 548; see also *Lee* v. *Gibbings*, *supra*, *per* KEKEWICH, J. (to the effect that

interlocutory injunction if there is no reason to suppose that any injury is being done to the plaintiff, either in person or property (*r*).

SECT. 13. Prevention of Libellous Statements.

SECT. 14.—*Restraint of Legal Proceedings* (*a*).

SUB-SECT. 1.—*In English Courts.*

In general.

555. No cause or proceeding pending in the High Court or before the Court of Appeal can now be restrained by prohibition or injunction, but every matter of equity in which an injunction against the prosecution of any such cause or proceeding might have been obtained prior to the passing of the Judicature Act, 1873 (*b*), either unconditionally or on any terms or conditions, may be relied upon by way of defence thereto (*c*).

The court has jurisdiction, however, to restrain a person from instituting proceedings (*d*), and also to restrain pending proceedings in the county court (*e*), the Mayor's Court, London (*f*), the Chancery Court of Lancaster (*g*), and the Liverpool Court of

with the exception of the case of trade libels, an interlocutory injunction will not be granted before the case has been submitted to a jury); and see generally, title LIBEL AND SLANDER.

(*r*) *Salomons* v. *Knight*, [1891] 2 Ch. 294, C. A.; see *Tallerman* v. *Dowsing Radiant Heat Co.*, [1900] 1 Ch. 1, C. A. (a case of false representation by a trader).

(*a*) See titles COUNTY COURTS, Vol. VIII., pp. 433, 504; PRACTICE AND PROCEDURE. As to restraining proceedings in company cases, see title COMPANIES, Vol. V., pp. 400, 401, 533, 541.

(*b*) 36 & 37 Vict. c. 66. As to injunction to restrain proceedings before 1873, see title EQUITY, Vol. XIII., p. 47.

(*c*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5); *Garbutt* v. *Fawcus* (1875), 1 Ch. D. 155, C. A. This power has been impliedly taken away from the county courts, also (*Cobbold* v. *Pryke* (1879), 49 L. J. (Q. B.) 8). Nothing in the Judicature Act, 1873 (36 & 37 Vict. c. 66), however, disables the High Court or the Court of Appeal from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit; see the proviso to s. 24 (*ibid.*). See also R. S. C., Ord. 25, r. 4; Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51).

(*d*) *Besant* v. *Wood* (1879), 12 Ch. D. 605, 630; see *Cercle Restaurant Castiglione Co.* v. *Lavery* (1881), 18 Ch. D. 555; *Re A Company*, [1894] 2 Ch. 349; *Hart* v. *Hart* (1881), 18 Ch. D. 670, 680. Where there is a dispute as to the conduct of an officer of the court, the court will not allow him to be sued in another court with respect to acts done in the discharge of his office (*Re Maidstone Palace of Varieties, Ltd., Blair* v. *Maidstone Palace of Varieties, Ltd.*, [1909] 2 Ch. 283; and see *Aston* v. *Heron* (1834), 2 My. & K. 390).

(*e*) *Ratcliffe* v. *Winch* (1853), 16 Beav. 576; *Neighbour* v. *Brown* (1857), 26 L. J. (CH.) 670. But the court will not restrain a creditor who, previous to an administration order in a creditor's action, has obtained judgment against the executor, from pursuing his remedy in the county court against the executor personally (*Re Womersley, Etheridge* v. *Womersley* (1885), 29 Ch. D. 557); nor, where a company is in course of being wound up, will it restrain an action against the official liquidator in his private capacity in the county court (*Re Original Hartleypool Collieries Co.* (1882), 51 L. J. (CH.) 508); and, as to staying actions against companies in the course of being wound up, see title COMPANIES, Vol. V., pp. 533 *et seq*, and p. 262, *post*.

(*f*) *Barker* v. *Goodair* (1805), 11 Ves. 78; *Sieveking* v. *Behrens* (1837), 2 My. & Cr. 581; *Cotesworth* v. *Stephens* (1845), 4 Hare, 185; *Redhead* v. *Welton* (1861), 30 L. J. (CH.) 577; see *Anderson* v. *Kemshead* (1852), 16 Beav. 329, and title MAYOR'S COURT, LONDON.

(*g*) *Dyke* v. *Stephens* (1885), 29 Sol. Jo. 682; and see *Re Connolly Brothers, Ltd.*, *Wood* v. *Connolly Brothers, Ltd.*, [1911] 1 Ch. 731, C. A. The Vice-

SECT. 14. **Restraint of Legal Proceedings.**

Passage (*h*); for the above provision (*i*) is confined to causes or proceedings pending in the High Court (*j*).

Special tribunal.

556. Where Parliament has constituted a tribunal for a special purpose, the court cannot restrain persons who are entitled to do so from applying to it (*k*). No equity can be founded on an allegation that a court, legally constituted, is not properly competent to decide questions within its jurisdiction (*l*); but it seems that the court might interfere if a case of fraud could be made out (*m*).

Proceedings against company.

557. The court, on the application of the company or any creditor or contributor, has power after the presentation of a petition to wind up a company, but before a winding-up order has been made, to restrain any action or proceeding against the company (*n*), and may, after a winding-up order, order the transfer of any cause or matter pending in any other court against the company (*o*).

Criminal proceedings.

558. A court of equity has no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by Act of Parliament for breach of its enactments (*p*); nor will the plaintiff in a pending suit be restrained from instituting criminal proceedings against the defendant to the suit, unless the criminal proceedings are of the same nature as the civil proceedings (*q*).

SUB-SECT. 2.—*In Arbitration.*

Acting without authority.

559. The court has no general jurisdiction to restrain persons from acting without authority, and an injunction cannot be granted to restrain a man from taking proceedings out of court, as, for instance, in an arbitration in the name of a person who has given no authority to use it (*r*).

Injunction to restrain proceeding to arbitration.

560. An injunction cannot be granted to restrain a party from proceeding with an arbitration in a matter beyond the agreement

Chancellor of the County Palatine has no jurisdiction to restrain proceedings in the High Court (*Re Alison's Trusts and Re Johnsons, Infants* (1878), 8 Ch. D. 1, C. A.); and see title COURTS, Vol. IX., p. 121.

(*h*) *The Teresa* (1894), 71 L. T. 342; and see title COURTS, Vol. IX., p. 173.

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 29 (5).

(*j*) See *Hedley* v. *Bates* (1880), 49 L. J. (CH.) 170, explained in *Stannard* v. *St. Giles, Camberwell, Vestry* (1882), 20 Ch. D. 190, C. A.; and see title CROWN PRACTICE, Vol. X., p. 154.

(*k*) *Harris* v. *Jose* (1866), 14 W. R. 303; *Barnsley Canal Co.* v. *Twibell* (1844), 7 Beav. 19.

(*l*) *Barnsley Canal Co.* v. *Twibell*, *supra*, at p. 28; see *Bateman* v. *Boynton* (1866), 1 Ch. App. 359, 368.

(*m*) *Beauchamp (Earl)* v. *Darby*, [1866] W. N. 308.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 140. See also *ibid.*, s. 270 in the case of unregistered companies; and see title COMPANIES, Vol. V., pp. 533—541.

(*o*) R. S. C., Ord. 49, r. 5; *Re Stubbs' Estate, Hanson* v. *Stubbs* (1878), 8 Ch. D. 154.

(*p*) *Kerr* v. *Preston Corporation* (1876), 6 Ch. D. 463.

(*q*) *Saull* v. *Browne* (1874), 10 Ch. App. 64. As to proceeding against a company in liquidation for rates and penalties, see title COMPANIES, Vol. V., p. 538. As to transfer of proceedings after administration order, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 342.

(*r*) *London and Blackwall Rail. Co.* v. *Cross* (1886), 31 Ch. D. 354, C. A.

SECT. 14. Restraint of Legal Proceedings.

to refer (*s*). Nor will arbitration proceedings be restrained on the ground that, since the transactions under the agreement are gambling transactions, the arbitrator cannot have jurisdiction (*t*). But the court has jurisdiction to interfere on equitable grounds where an action has been brought impeaching the instrument to refer (*u*), or where the parties have by their conduct excluded themselves from the benefit of their contract to arbitrate (*v*), or where there is nothing to refer (*a*), or on the ground of corruption (*b*) or unfitness or incompetence to act (*c*) on the part of the arbitrator. So, also, where an agreement made by two companies contains clauses which are beyond the powers of the directors and not warranted by the constitution of one of the companies, the court will, at the suit of a shareholder of that company, restrain arbitration in respect of alleged breaches of those clauses (*d*). In order to justify the court in saying that an arbitrator named in a contract is disqualified from acting on the ground of bias, circumstances must be shown to exist which establish, at least, a probability that he will in fact be biassed (*e*). If an umpire is improperly appointed the court will restrain him from acting (*f*).

SUB-SECT. 3.—*In Foreign Courts.*

Foreign proceedings.

561. With regard to foreign proceedings, the court will restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign court whenever the circumstances of the case make such an interposition necessary or expedient (*g*). If the

(*s*) *North London Rail. Co.* v. *Great Northern Rail. Co.* (1883), 11 Q. B. D. 30, C. A.; *Farrar* v. *Cooper* (1890), 44 Ch. D. 323; *Wood* v. *Lillies* (1892), 61 L. J. (CH.) 158; see *London and Blackwall Rail. Co.* v. *Cross* (1886), 31 Ch. D. 354, C. A.; and title ARBITRATION, Vol. I., pp. 446, 452 *et seq.*

(*t*) *M'Harg* v. *Universal Stock Exchange* (1895), 11 T. L. R. 409, C. A.

(*u*) *Kitts* v. *Moore*, [1895] 1 Q. B. 253, C. A.; see *Mylne* v. *Dickinson* (1815), Coop. G. 195.

(*v*) *Pickering* v. *Cape Town Rail. Co.* (1865), L. R. 1 Eq. 84 (where the repudiation of a contract was held to be a waiver of the right to proceed by arbitration under the same contract).

(*a*) *Sissons* v. *Oates* (1894), 10 T. L. R. 392.

(*b*) *Malmesbury Rail. Co.* v. *Budd* (1876), 2 Ch. D. 113.

(*c*) *Beddow* v. *Beddow* (1878), 9 Ch. D. 89; *Nuttall* v. *Manchester Corporation* (1892), 8 T. L. R. 513; see *Jackson* v. *Barry Rail. Co.*, [1893] 1 Ch. 238, C. A.; *Great Western Rail. Co.* v. *Waterford and Limerick Rail. Co.* (1881), 17 Ch. D. 493, C. A.

(*d*) *Maunsell* v. *Midland Great Western (Ireland) Rail. Co.* (1863), 1 Hem. & M. 130; but not at the suit of a shareholder of the other company on the ground that the stipulations of any such clause are beyond the powers of the directors of the company, in which he is not a shareholder (*ibid.*).

(*e*) *Jackson* v. *Barry Rail. Co., supra; Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667, C. A.; *Ives and Barker* v. *Willans*, [1894] 2 Ch. 478, C. A.; *Bright* v. *River Plate Construction Co.*, [1900] 2 Ch. 835; see *Re Haigh and London and North Western and Great Western Rail. Cos.*, [1896] 1 Q. B. 649; *Blackwell (Robert W.) & Co., Ltd.* v. *Derby Corporation* (1909), 75 J. P. 129, C. A. (where the court refused to stay proceedings under the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4, pending a submission); and see *Freeman (G.) & Sons* v. *Chester Rural Council*, [1911] 1 K. B. 783, C. A.

(*f*) *Pescod* v. *Pescod* (1887), 58 L. T. 76.

(*g*) *Carron Iron Co.* v. *Maclaren* (1855), 5 H. L. Cas. 416, 436. A foreigner

SECT. 14. **Restraint of Legal Proceedings.**

circumstances are such as would have made it the duty of the court to restrain proceedings in this country, they will also warrant it in restraining proceedings in a foreign court (*h*). The jurisdiction is grounded, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party against whom the injunction is sought being within the power of the court (*i*); and its exercise is a matter of discretion (*k*).

What is sufficient ground for interference.

Mere hardship or inconvenience is not sufficient to justify the interference of the court (*l*). The fact of a foreigner having property in this country enables the court here to make effectual an injunction issued against him, but the issuing of such an injunction, especially in the case of a foreigner who seeks no assistance from the courts here, ought to be clearly shown to be required as conducive to justice (*m*), and where the case is simply one of interference by a stranger with the property of another, in a mode which is warranted by the laws of a foreign country, upon an assumption of right, there is no foundation for the interference of the court (*n*).

So, also, the court will not restrain divorce proceedings in a foreign country by a person resident here, but who has acquired a domicil in that country (*a*).

No jurisdiction to prevent foreigner resident abroad from suing in his own country.

562. The English courts have no jurisdiction to restrain a foreigner, resident abroad, from suing for his debt in the courts of his own country, even after a decree for administration has been made in this country (*b*). The mere fact that a foreigner has property or agents for sale of goods here does not give the court

who has appeared to an action in an English court gives jurisdiction to the English court to restrain him from proceeding to litigate the same subject-matter in the courts of his own country (*Dawkins* v. *Simonetti* (1880), 29 W. R. 228, C. A.). See further hereon, titles COMPANIES, Vol. V., p. 540; CONFLICT OF LAWS, Vol. VI., pp. 298—301; see also *ibid.*, pp. 191 *et seq.*, 291.

(*h*) *Carron Iron Co.* v. *Maclaren* (1855), 5 H. L. Cas. 416, 439; and see *Portarlington* (*Lord*) v. *Soulby* (1834), 3 My. & K. 104.

(*i*) *Portarlington* (*Lord*) v. *Soulby*, *supra*, at p. 108; *Carron Iron Co.* v. *Maclaren*, *supra*, at p. 436.

(*k*) See title CONFLICT OF LAWS, Vol. VI., p. 300; *Parnell* v. *Parnell* (1858), 7 I. Ch. R. 322. The court will give credit to foreign courts for doing justice in their own jurisdiction (*Wright* v. *Simpson* (1802), 6 Ves. 714, 730; *Wallace* v. *Campbell* (1840), 4 Y. & C. (EX.) 167, 168; *Pennell* v. *Roy* (1853), 3 De G. M. & G. 126, 140, C. A.; *Fletcher* v. *Rodgers* (1878), 27 W. R. 97, C. A.; *Dawkins* v. *Simonetti*, *supra*).

(*l*) *Fletcher* v. *Rodgers*, *supra*.

(*m*) *Carron Iron Co.* v. *Maclaren*, *supra*.

(*n*) *Pennell* v. *Roy*, *supra*, at p. 139; and since the ground of convenience only applies where there are two courts having jurisdiction, it cannot be urged in cases of this kind (*ibid.*). As to an injunction to restrain the enforcement of a foreign attachment on goods, see *Mildred* v. *Neate* (1755), 1 Dick. 279.

(*a*) *Vardopulo* v. *Vardopulo* (1909), 25 T. L. R. 518, C. A.

(*b*) *Carron Iron Co.* v. *Maclaren*, *supra*, at p. 441; *Re Boyse*, *Crofton* v. *Crofton* (1880), 15 Ch. D. 591. The statement in *Maclaren* v. *Stainton*, *Maclaren* v. *Carron Co.* (1855), 26 L. J. (CH.) 332, C. A., to the effect that "there must be a very strong case to induce the court to restrain a foreigner, domiciled in another country, from proceeding to obtain payment of debts according to the law of the country in which he is domiciled," seems inconsistent with the statement in the text that the court has no jurisdiction in cases of this kind.

jurisdiction (*c*), though the case would be different if he had come in under the decree or had sought or obtained relief in this country (*d*).

SECT. 14. Restraint of Legal Proceedings.

SECT. 15.—*Miscellaneous.*

Restraining improper transfers of stocks and shares.

563. An injunction (*e*) may be granted to restrain a defendant from making an improper transfer of stock (*f*) or shares (*g*), or from improperly parting with bonds (*h*). The Bank of England cannot, however, prevent the executor of a testator possessed of stock in the Government funds from selling or transferring it. All that the bank has to do is to look to the legal title and not to the trusts of the will beyond it (*i*). An injunction may also be obtained, before or on the hearing of any cause, to restrain the Bank of England from permitting the transfer of stock standing in its books or from paying any dividends accrued or accruing thereon, although the bank is not a party (*k*). The application must be made upon notice to the defendants, unless, from the necessity or urgency of the case, notice cannot be given. In the latter case the application

(*c*) *Carron Iron Co.* v. *Maclaren* (1855), 5 H. L. Cas. 416, 442; and see *Sudlow* v. *Dutch Rhenish Rail. Co.* (1855), 21 Beav. 43.

(*d*) *Carron Iron Co.* v. *Maclaren*, *supra*, at p. 442.

(*e*) The dealing with stocks, shares, securities and dividends may also be temporarily prevented by means of a notice in lieu of *distringas* (see R. S. C., Ord. 46, rr. 3—11, and title EXECUTION, Vol. XIV., p. 113), or, when the stocks, shares, or securities and dividends are in court, by means of a stop order (see R. S. C., Ord. 46, rr. 3, 12, 13, and title EXECUTION, Vol. XIV., p. 110).

(*f*) *Chedworth* (*Lord*) v. *Edwards* (1802), 8 Ves. 46; *Stead* v. *Clay* (1828), 4 Russ. 550; see *Goldsmith* v. *Russell* (1855), 5 De G. M. & G. 547. Where a transfer is about to be made of stock to wrong persons through mistake, an injunction will not be granted *ex parte* to restrain the transfer, unless the plaintiff swears that he believes the defendant will avail himself of the error, and will refuse to make a retransfer (*Arkwright* v. *Gryles* (1844), 13 L. J. (CH.) 303).

(*g*) *Mann* v. *Patent Tramways Cable Corporation*, [1886] W. N. 66; *Everitt* v. *Automatic Weighing Machine Co.*, [1892] 3 Ch. 506.

(*h*) *Glasse* v. *Marshall* (1845), 15 Sim. 71. As to granting an injunction in respect of moneys at a bank, see *Glasse* v. *Marshall*, *supra*; *Pennell* v. *Deffell* (1853), 4 De G. M. & G. 372, C. A.

(*i*) *Bank of England* v. *Moffat* (1791), 3 Bro. C. C. 260; *Bank of England* v. *Parsons* (1800), 5 Ves. 665; *Bank of England* v. *Lunn* (1809), 15 Ves. 569; *Franklin* v. *Bank of England* (1826), 1 Russ. 575; see *Fowler* v. *Churchill*, *Churchill* v. *Bank of England* (1843), 11 M. & W. 323; *Adam* v. *Bank of England* (1908), 52 Sol. Jo. 682; and National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 23. The Bank of England and the Bank of Ireland, respectively, can, however, if the circumstances of the case appear to them to make it expedient, require evidence of the title of any person claiming the right to make the transfer, before allowing any transfer of the stock (*ibid.*, s. 24). The court will not interfere with the discretion of the Bank as to the evidence it requires, exercised *bonâ fide*, so as to compel it to depart from its settled practice (*Prosser* v. *Bank of England* (1872), L. R. 13 Eq. 611). As to the Bank of England generally, see title BANKERS AND BANKING, Vol. I., p. 570.

(*k*) Stat. 1800 (39 & 40 Geo. 3, c. 36), s. 1. If after giving the Bank notice the plaintiff does not apply for an injunction, the court may, on the application of the defendants, order that the Bank do permit the transfer on a given day, unless in the meantime an injunction to restrain such transfer shall be granted (*Ross* v. *Shorer* (1821), 5 Madd. 458; Madd. & G. 1). For form of order, see 1 Seton, Judgments and Orders, 6th ed., p. 729 (1).

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must be upon affidavit proving that such necessity and urgency exist (*l*).

Summary proceedings by motion or petition.

So, too, upon the application by motion or petition of any party interested, the court may in a summary way, without a writ issued (*m*), restrain the Bank of England and any other public company from permitting the transfer of stock in the public funds, or any stock or shares in any public company standing in the names of any persons in their books, or from paying dividends due or to become due thereon (*n*). Any party interested may apply to discharge or vary the order (*o*).

Negotiable instruments.

564. In a proper case an injunction (*p*) may be obtained to restrain the negotiation, indorsement, assignment, pledge, or parting with negotiable instruments which have been illegally, fraudulently, or improperly obtained (*q*), and if the instrument is liable to be completely avoided (*r*) the court may also order it to be delivered up and cancelled (*s*).

Restraining disposition of property.

565. So, also, an injunction (*t*) may be obtained in a proper case

(*l*) *Temple* v. *Bank of England* (1802), 6 Ves. 669, 772 a.

(*m*) Court of Chancery Act, 1841 (5 Vict. c. 5), s. 4; but the party obtaining the injunction must issue a writ in due time in order to sustain the injunction (*Re 5 Vict. c. 5, and Re Hertford* (*Marquis*), *Hertford* (*Marquis*) v. *Suisse* (1844), 8 Jur. 71; see *Re Suisse* (1842), 6 Jur. 597, 654).

(*n*) A Government annuity is within this provision (*Ex parte Watts* (1871), 19 W. R. 400); for form of order, see 1 Seton, Judgments and Orders, 6th ed., p. 729 (2), (3). Notice of the order, if obtained *ex parte*, must be served on the legal owners of the stock; *Re Blaksley's Trusts* (1883), 23 Ch. D. 549 (the application may be made *ex parte*); see *Ex parte Field* (1841), 1 Y. & C. Ch. Cas. 1; *Ex parte Watts, supra; Meluish* v. *Milton* (1876), 24 W. R. 679; *Re Blakesley's Trusts, supra; Re Court of Chancery Act*, 1841, *Re Pike*, [1902] W. N. 42. The motion or petition should be entitled in the matter of the Court of Chancery Act, 1841 (5 Vict. c. 5), and of the person applying, and if he is a trustee, in the matter of the trust also (*Re Court of Chancery Act*, 1841, *Re Pike, supra;* see *Re Blaksley's Trusts, supra*).

(*o*) Court of Chancery Act, 1841 (5 Vict. c. 5), s. 4. The application should be by motion with notice to the person by whom the order was obtained, and should be supported by affidavit (*Ex parte Amyot* (1841), 1 Ph. 130, n.; *Re Suisse, supra*, at p. 654).

(*p*) Even *ex parte* (—— v. *Bozon* (1824), 3 L. J. (o. s.) (CH.) 57).

(*q*) *Green* v. *Pledger* (1844), 3 Hare, 165; *Smith* v. *Hakewell* (1746), 1 Seton, Judgments and Orders, 6th ed., p. 727; *Lewes* (*Earl*) v. *Barnett* (1876), 1 Seton, Judgments and Orders, 6th ed., p. 728; *Day* v. *Longhurst*, [1893] W. N. 3. See also *Thiedemann* v. *Goldschmidt* (1859), 1 De G. F. & J. 4, C. A., and *Maitland* v. *Chartered Mercantile Bank of India, London, and China* (1865), 12 L. T. 372 (where the negotiable instruments were being used improperly for purposes other than those for which they were issued).

(*r*) *Brooking* v. *Maudslay, Son and Field* (1888), 38 Ch. D. 636.

(*s*) See *Esdaile* v. *La Nauze and Heyland* (1835), 1 Y. & C. (EX.) 394; *Cooper* v. *Joel* (1859), 1 De G. F. & J. 240; *Traill* v. *Baring* (1864), 4 De G. J. & Sm. 318, C. A.

(*t*) In an urgent case, *ex parte*, see *Barry* v. *Donnellan* (1826), 1 Hog. 339 (application to restrain the transfer of stock), but see *Doolittle* v. *Walton* (1771), 2 Dick. 442 (where Lord BATHURST, L.C., said an injunction to prevent the transfer of stock would not be granted, till after the defendants had appeared or were in contempt for want of it and upon notice).

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to restrain the sale (*a*), assignment (*b*), or alienation (*c*) of property (*d*), and, where property has been directed to be sold by decree, the court will sometimes stay the sale pending an appeal, but, in such circumstances, if the property consists of personal chattels remaining in the possession of the appellant, he will be required to give ample security for their value (*e*). Even where the thing which the defendant threatens to sell is a chattel, the court will interfere if it possesses a peculiar and intrinsic value,

Chattels.

(*a*) *Hawes* v. *James* (1818), 1 Wils. (CH.) 2 (sale by Commissioners under colour of Act of Parliament stayed, it being doubtful whether the sale was a proper exercise of their power, the property also being offered at an undervalue); *Wallis* v. *Wallis* (1802), Daniell, Chancery Practice, 7th ed., p. 1362 (representatives of a mortgagee who had obtained the mortgage deeds by fraud restrained from selling the mortgaged property); *Delafield* v. *Guanabeus* (1809), Daniell, Chancery Practice, 7th ed., p. 1362 (the master of a ship which had been driven into Plymouth by stress of weather restrained from selling the ship's cargo at the instance of the supercargo and shipowner, but see *Rayne* v. *Benedict* (1841), 10 L. J. (CH.) 297, as to the conditions of relief which will be imposed on the owners of the goods when the ship has become unable to proceed on her voyage without repairs); *Sheppard* v. *Oxenford* (1855), 3 W. R. 397 (sale by the sole director of an association of the property of the association for the purpose of recouping himself sums he had advanced restrained); *Re Blakely Ordnance Co.*, *Blakely* v. *Dent* (1867), 15 W. R. 663, C. A. (sale of machinery and plant restrained at suit of plaintiff who set up a lien); *Brand* v. *Mitson* (*otherwise Brand*) (1876), 24 W. R. 524 (defendant claiming to be widow of intestate restrained from disposing of the estate at the suit of the plaintiff, who claimed the grant of administration as next of kin); *Lemprière* v. *Lange* (1879), 12 Ch. D. 675 (where in an action against an infant who had agreed to take a lease of a furnished house, the furniture to become his on payment at any time of a lump sum, the lease was declared void and the defendant restrained from selling the furniture); *Wheelwright* v. *Walker* (1883), 23 Ch. D. 752 (a tenant for life restrained from selling until trustees had been properly appointed for the purposes of the Settled Land Act, 1882 (45 & 46 Vict. c. 38)); *Dickenson* v. *Brown* (1887), 3 T. L. R. 350, C. A. (sale of goods restrained till trial); *Hampden* v. *Buckinghamshire* (*Earl*), [1893] 2 Ch. 531, C. A. (tenant for life restrained from mortgaging the settled estates); see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 53, and pp. 251, 254, *ante*. As to restraining a distress, see title DISTRESS, Vol. XI., p. 208. As to restraining proceedings on a bill of sale, see title BILLS OF SALE, Vol. III., p. 65; *Re Johnstone*, *Ex parte Abrams* (1884), 50 L. T. 184. As to restraining the presentation of a petition to wind up a company, and as to the exercise of the court's inherent jurisdiction to prevent abuse of process where the purpose of the petition is not the ostensible reason, see *Re a Company*, [1894] 2 Ch. 349; and title COMPANIES, Vol. V., p. 401.

(*b*) *Powell* v. *Wright* (1844), 7 Beav. 444, 452.

(*c*) *Beyfus* v. *Bullock* (1869), L. R. 7 Eq. 391; *Gooch* v. *London Banking Association* (1886), 32 Ch. D. 41, C. A.; *Elphinstone* (*Lord*) v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; but see as to the last two cases, *Craig's Claim*, [1895] 1 Ch. 267, 276, C. A.; *Re Panther Lead Co.*, [1896] 1 Ch. 978, 985.

(*d*) Notwithstanding that a principal party interested is out of the jurisdiction (*Malcolm* v. *Scott* (1843), 3 Hare, 39). Although the court has no jurisdiction over a foreign Government which, or a foreign ambassador who does not submit to the jurisdiction (see titles ACTION, Vol. I., pp. 18, 19; CONFLICT OF LAWS, Vol. VI., pp. 232, 233; CONSTITUTIONAL LAW, Vol. VI., pp. 430, 431; and p. 205, *ante*), an injunction may be granted to restrain an agent of a foreign Government from transmitting securities abroad which ought to be deposited in this country (*Foreign Bondholders' Corporation* v. *Pastor* (1874), 23 W. R. 109), or a bank from parting with a fund, so as to protect the Bank from any proceedings by an ambassador (*Gladstone* v. *Musurus Bey* (1862), 1 Hem. & M. 495).

(*e*) *Nerot* v. *Burnand* (1826), 2 Russ. 56; *Jenkins* v. *Herries* (undated), Sugden, Vendors and Purchasers, 14th ed., p. 63.

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so that damages would not be an adequate remedy (*f*), and, where a fiduciary relation exists between the parties, whether or not the article possesses any such value (*g*).

Documents.

566. In a proper case an injunction may be granted to restrain a defendant from parting with documents in his possession belonging to the plaintiff and preventing the plaintiff and his solicitor from having access to them at all reasonable times and after reasonable notice (*h*).

Forfeiture of shares.

If, in pending proceedings for the rescission of a contract to take shares, the defendant company gives notice to the plaintiff to forfeit the shares for non-payment of calls, an injunction may be granted on terms restraining the forfeiture until trial of the action (*i*).

Parting with property.

567. An injunction will not be granted to restrain a defendant who is alleged to be a debtor from parting with his property (*k*).

Husband and wife.

568. A husband may be restrained from interfering or intermeddling with his wife's separate property (*l*). A wife who has divorced her husband and obtained an order for alimony is thereby constituted a judgment creditor of her husband, and, in an action against him and the trustees of a settlement made on a previous marriage, under which he has a life interest, may obtain an order appointing a receiver of her husband's interest and

(*f*) *Tonnins* v. *Prout* (1766), 1 Dick. 387 (diamonds); *Arundell* (*Lady*) v. *Phipps and Taunton* (1804), 10 Ves. 139 (family pictures); *Macclesfield* (*Earl*) v. *Davis* (1814), 3 Ves. & B. 16 (plate and an iron chest); *North* v. *Great Northern Rail. Co.* (1860), 2 Giff. 64 (where the chattel had acquired a special value from being used in business); see *Ridgway* v. *Roberts* (1844), 4 Hare, 106 (a ship); *Falcke* v. *Gray* (1859), 4 Drew. 651 (china jars—specific performance case). But the court has no jurisdiction where the plaintiff has himself put a value upon the property (*Dowling* v. *Betjemann* (1862), 2 John. & H. 544). A plaintiff wishing to prevent the disposition of goods must show a specific right in the property, and that they are in danger of being lost (*Ximenes* v. *Franco* (1751), 1 Dick. 149, *per* Lord HARDWICKE, L.C. (diamonds)).

(*g*) *Wood* v. *Rowcliffe* (1844), 3 Hare, 304 (furniture and effects); and see *Pooley* v. *Budd* (1851), 14 Beav. 34 (iron—specific performance case).

(*h*) *Goodale* v. *Goodale* (1848), 16 Sim. 316.

(*i*) *Jones* v. *Pacaya Rubber and Produce Co., Ltd.*, [1911] 1 K. B. 455, C. A.; see title COMPANIES, Vol. V., p. 132.

(*k*) *Robinson* v. *Pickering* (1881), 16 Ch. D. 660, C. A., *per* JAMES, L.J., at p. 661 ; see *Mills* v. *Northern Railway of Buenos Ayres Co.* (1870), 5 Ch. App. 621. A creditor is no more entitled to such an injunction against a married woman than he is against a man (*Robinson* v. *Pickering*, *supra*, at p. 663).

(*l*) *Green* v. *Green* (1840), 5 Hare, 400, n.; *Wood* v. *Wood* (1871), 19 W. R. 1049; *Symonds* v. *Hallett* (1883), 24 Ch. D. 346, C. A.; *Donnelly* v. *Donnelly* (1886), 31 Sol. Jo. 45; *Gaynor* v. *Gaynor*, [1901] 1 I. R. 217; also from entering upon the wife's property (*Wood* v. *Wood*, *supra*; *Symonds* v. *Hallett*, *supra*; *Donnelly* v. *Donnelly*, *supra*); but only, it seems, where the right is claimed for purposes other than to enforce marital rights (*Symonds* v. *Hallett*, *supra*; *Gaynor* v. *Gaynor*, *supra*; see *Weldon* v. *De Bathe* (1884), 14 Q. B. D. 339, 343, C. A.). In *Wood* v. *Wood*, *supra*; *Donnelly* v. *Donnelly*, *supra*; *Gaynor* v. *Gaynor*, *supra*, the injunctions were to restrain the interference with the business carried on by the wife, and which was secured to her separate use. See also Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12; and title HUSBAND AND WIFE, Vol. XVI., pp. 459, 460.

restraining the trustees from acting upon any consent given by him to advances being made to children under an advancement clause in the settlement (*m*). So, also, where an order has been made for permanent alimony, the husband may be restrained from making away with his property (*n*), but the court has no jurisdiction to make such an order before an order for alimony has been made (*o*). The court will also enforce the observance of legal and proper covenants in separation deeds (*a*).

Control and management of children.

569. In certain circumstances the court will not only control a parent in the management and custody of children, but may even altogether remove the children from the influence of the parent; and, in a proper case, will grant an injunction for the purpose of partially or completely restraining the parent from exercising any control over or having any intercourse with his or her children (*b*). In very special circumstances an injunction may be granted to restrain an adult child from entering a parent's house (*c*).

Marriage of infant wards of court.

570. An injunction may be granted restraining the marriage of an infant ward of court and all communication and intercourse with the ward (*d*), and when the party seeking to marry the ward is also an infant, his guardian may be restrained from permitting him to marry the ward without leave of the court (*e*).

Opening letters.

571. An injunction may be obtained to restrain the opening of letters not addressed to the defendant (*f*), and the court will also

(*m*) *Oliver* v. *Lowther* (1880), 28 W. R. 381. See title HUSBAND AND WIFE, Vol. XVI., pp. 568, 569; and as to restraining the payment of a legacy to a husband who has failed to comply with an order for payment of his wife's bill of costs in a divorce suit, see *ibid.*, p. 525.

(*n*) *Sidney* v. *Sidney* (1867), 17 L. T. 9; *Newton* v. *Newton*, [1896] P. 36. See title HUSBAND AND WIFE, Vol. XIV., p. 568.

(*o*) *Newton* v. *Newton* (1885), 11 P. D. 11. As to restraining the sale of settled property, as to which it is intended to petition for variation, see title HUSBAND AND WIFE, Vol. XVI., p. 576. In *Watts* v. *Watts* (1876), 24 W. R. 623, the defendant, against whom a decree of divorce had been made, was restrained under the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, from selling or parting with property comprised in a post-nuptial settlement, and in *Noakes* v. *Noakes* (1877), 4 P. D. 60, a similar injunction was obtained, even though a decree *nisi* only had been obtained; but compare *Newton* v. *Newton*, *supra*, at p. 13; and title EQUITY, Vol. XIII., pp. 51, 52.

(*a*) *Hamilton* v. *Hector* (1872), L. R. 13 Eq. 511; *Besant* v. *Wood* (1879), 12 Ch. D. 605; see *Marshall* v. *Marshall* (1879), 5 P. D. 19; and title HUSBAND AND WIFE, Vol. XVI., pp. 441, 449.

(*b*) See titles HUSBAND AND WIFE, Vol. XVI., pp. 449 *et seq.*, 577 *et seq.*; INFANTS AND CHILDREN, pp. 106, 169, *ante*.

(*c*) *Stevens* v. *Stevens* (1907), 24 T. L. R. 20; *Waterhouse* v. *Waterhouse* (1905), 94 L. T. 133.

(*d*) *Smith* v. *Smith* (1746), 3 Atk. 304; *Pearce* v. *Crutchfield* (1807), 14 Ves. 206; *Norris* v. *Ormond*, [1883] W. N 58; and see *Warter* v. *Yorke* (1815), 19 Ves. 451 (where all parties to the transaction were restrained from all intercourse, personal, by correspondence, or otherwise, with the infant). In *Pearce* v. *Crutchfield*, *supra*, the order was not confined to the minority, but granted generally till further order; see also *Norris* v. *Ormond*, *supra*; *sed quære*, see *Bolton* v. *Bolton*, [1891] 3 Ch. 270, C. A.

(*e*) *Smith* v. *Smith*, *supra*; see generally, title INFANTS AND CHILDREN, pp. 146—149, *ante*.

(*f*) *Scheile* v. *Brakell* (1863), 11 W. R. 796; see *Edgington* v. *Edgington* (1864), 11 L. T. 299.

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interfere to prevent a defendant, by reason of his having been employed in the plaintiffs' business, from obtaining letters which, though addressed to him by name, really belong to the plaintiffs, and, when such letters come, under an address given by him to the postmaster, to his private address, a mandatory injunction may be granted compelling the defendant to withdraw his notice to the postmaster (*g*).

Publication of pending proceedings.

572. The court will also, in a proper case, restrain the publication of pending proceedings when such publication tends to prejudice the public mind or obstructs the course of justice (*h*), or the issue of circulars or notices abusive of a party to, and tending to the prejudice of the fair trial of, an action (*i*). It is not, however, in every case of an unfair report purporting to represent what takes place in open court, that an injunction will be granted (*k*) ; but the circumstance that the publication of a garbled account is by way of defence and in answer to similar publications by the other side, although it may excuse the party sought to be restrained from the costs of the motion, will not prevent the court from granting the injunction (*l*).

Disturbance of occupation.

573. In a proper case an injunction may be granted to restrain a defendant from disturbing the plaintiff in his possession or occupation of a house (*m*).

Interference with churchyard.

An unauthorised interference with a churchyard may also be restrained in a proper case (*n*).

Against renewal of solicitor's certificate.

In special circumstances a solicitor who has not taken out his certificate for several years may be restrained from applying to renew his certificate without the leave of the court (*o*).

Publication.

An injunction may also be had to restrain the publication of a work as the plaintiff's which is not his (*p*).

Use of name.

An injunction will not be granted to restrain the use of a

(*g*) *Hermann Loog* v. *Bean* (1884), 26 Ch. D. 306, C. A. In this case the plaintiffs were put upon an undertaking to open the letters in question only at certain specified times, with liberty to the defendant to be present at the opening. See also *Stapleton* v. *Foreign Vineyard Association* (1864), 12 W. R. 976, the converse case, where the injunction was sought by a former employee.

(*h*) *Brook* v. *Evans* (1860), 29 L. J. (CH.) 616, C. A. ; and see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 287, 308; and *Re Huggonson* (1742), 2 Atk. 469; *R.* v. *Clement* (1821), 4 B. & Ald. 218.

(*i*) *Kitcat* v. *Sharp* (1882), 52 L. J. (CH.) 134; *Coats* (*J. & P.*) v. *Chadwick*, [1894] 1 Ch. 347; see *Matthews* v. *Smith* (1844), 3 Hare, 331; *Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860 ; and title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 281, 284 *et seq.* In *Mackett* v. *Herne Bay Commissioners* (1876), 24 W. R. 845, the defendant in a pending action, in which many of the inhabitants of a town were to be examined as witnesses, was restrained from preaching a sermon upon the subject in his chapel in the town and also from issuing placards announcing his intention to preach the sermon.

(*k*) *Brook* v. *Evans*, *supra*.

(*l*) *Coleman* v. *West Hartlepool Rail. Co.* (1860), 8 W. R. 734.

(*m*) *Spurgin* v. *White* (1860), 2 Giff. 473; *Collison* v. *Warren*, [1901] 1 Ch. 812, C. A.

(*n*) See title BURIAL AND CREMATION, Vol. III., p. 410, and as to the circumstances in which a burial might be restrained, *ibid.*, p. 414.

(*o*) *Re Whitehead* (1885), 28 Ch. D. 614, C. A.

(*p*) *Byron* (*Lord*) v. *Johnston* (1816), 2 Mer. 29.

patronymic name of a family (*q*), but the use of a name in connection with a trade or business may be protected (*r*); nor, in the absence of fraud or malice, will a defendant be restrained from calling his house by the name of the plaintiff's house (*s*).

Receiver's proceedings.

A person who is prejudiced by the conduct of a receiver appointed in an action ought not, without the leave of the court, to commence an action to restrain the proceedings of the receiver, even though the act complained of is beyond the receiver's authority. His proper course is to apply for such relief as he is entitled to, in the action in which the receiver was appointed (*t*).

Part V.—Procedure to obtain Injunction.

SECT. 1.—*Parties.*

Party seeking injunction must have sufficient interest.

574. An injunction will only be granted at the suit of a party having sufficient interest in the relief sought (*a*). If the injury complained of affects the public interest the Attorney-General must be joined (*b*), unless the plaintiff can show that the interference with the public right involves an interference with his private rights, or that, although his private rights are not interfered with, he suffers special damage, peculiar to himself, from the interference with the public right (*c*).

When public interest affected.

Defendants.

575. The fact that a party claims as of right to do an act, even though he has no present intention of doing it, is sufficient ground for making him a party to an action for an injunction to restrain him from doing it (*d*). A man who has parted with his whole interest in the subject-matter ought not to be made a party (*e*), but where a person has not parted with his interest until after the action has been commenced against him, an injunction may be granted against him (*f*). In an action for an injunction to prevent the

(*q*) *Du Boulay* v. *Du Boulay* (1869), L. R. 2 P. C. 430; *Cowley* (*Earl*) v. *Cowley* (*Countess*), [1901] A. C. 450.

(*r*) *Du Boulay* v. *Du Boulay*, *supra*; compare *Outram* (*George*) *& Co., Ltd.* v. *London Evening Newspapers Co., Ltd.* (1911), 27 T. L. R. 231. See title TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*s*) *Day* v. *Brownrigg* (1878), 10 Ch. D. 294, C. A.; see *Street* v. *Union Bank of Spain and England* (1885), 30 Ch. D. 156 (where an injunction to restrain the use of the phrase "Street, London" as a cypher address for telegrams was refused).

(*t*) *Searle* v. *Choat* (1884), 25 Ch. D. 723, C. A.; see *Re Potter, Ex parte Day* (1883), 48 L. T. 912; and title RECEIVERS.

(*a*) *Wynne* v. *Newborough* (*Lord*) (1790), 1 Ves. 164; *Leake* v. *Beckett* (1827), 1 Y. & J. 339; *Hunter* v. *Nockolds* (1846), 15 L. J. (CH.) 320.

(*b*) *A.-G.* v. *Compton* (1842), 1 Y. & C. Ch. Cas. 417, 427; *Soltau* v. *De Held* (1851), 2 Sim. (N. S.) 133, 150; see pp. 227 *et seq.*, 234 *et seq.*, *ante*.

(*c*) *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109; see pp. 227 *et seq.*, 234 *et seq.*, *ante*.

(*d*) *Hext* v. *Gill* (1872), 7 Ch. App. 699; *Shafto* v. *Bolckow, Vaughan, & Co.* (1887), 35 W. R. 562; see also *Tipping* v. *Eckersley* (1855), 2 K. & J. 264.

(*e*) *Hawkins* v. *Gardiner* (1853), 1 W. R. 345; *Clements* v. *Welles* (1865), L. R. 1 Eq. 200; *Evans* v. *Davis* (1878), 10 Ch. D. 747, 764.

(*f*) *Bird* v. *Lake* (1863), 1 Hem. & M. 111, 121.

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violation of an agreement, the persons alleged to have made the agreement must be parties (*g*).

Absent parties.

576. The absence of persons who will benefit by an injunction will not prevent the court from granting it (*h*), but an injunction will not be extended so as to protect persons who are not parties to the action (*i*), nor will it be granted in the absence of parties where it would operate injuriously against them (*k*).

Although an injunction will not as a rule be granted against a person not a party to the action (*l*), even if he appear (*m*), yet it may be granted against a person claiming title under the proceedings. Thus a purchaser under a decree may be restrained from committing waste before completion (*n*), or a tenant, to whom a receiver appointed in an action has let part of the estates, may be restrained from acting in breach of his tenancy agreement (*o*), although such purchaser or tenant is not a party to the action.

Company.

Where an injunction is granted against a company, an injunction, with costs, may also be granted against its secretary if he has been joined as a defendant and appeared and adopted the company's defence, although no evidence is adduced to show that he took any personal part in the acts complained of (*p*).

SECT. 2.—*Application for Injunction.*

SUB-SECT. 1.—*By Action.*

Injunction should be claimed.

577. Where the substantial object of the plaintiff is to obtain an injunction he should indorse his writ with a claim therefor (*q*), but where he omits to do so leave may be given to amend the indorsement by asking for an injunction (*a*). The nature of the injunction claimed should be stated on the indorsement (*b*). An injunction

(*g*) *Landed Estates Investment Co.* v. *Weeding* (1869), 18 W. R. 35.

(*h*) *Const* v. *Harris* (1824), Turn. & R. 496, 514; *Evans* v. *Coventry* (1854), 5 De G. M. & G. 911, C. A. So it seems where the absent parties, though proper parties to the action, would not be affected by the application (*Hamp* v. *Robinson* (1865), 3 De G. J. & Sm. 97, 110, C. A.).

(*i*) *Gadd* v. *Worrall* (1795), 2 Anst. 555.

(*k*) *M'Beath* v. *Ravenscroft* (1839), 8 L. J. (CH.) 208; *Hartlepool Gas and Water Co.* v. *West Hartlepool Harbour and Rail. Co.* (1865), 12 L. T. 366. In *Hardinge* v. *Southborough Local Board* (1875), 32 L. T. 250, an injunction was granted, although all the members of the local board had resigned.

(*l*) *Iveson* v. *Harris* (1802), 7 Ves. 251, 257.

(*m*) *Edison and Swan Electric Light Co.* v. *Holland* (1889), 6 R. P. C. 243, 286, C. A. The proper course is to add such persons as defendants (*ibid.*, at p. 285). Leave to amend and add the third party as a defendant will not be given after trial for the purposes of an appeal (*ibid.*, at p. 286, but see *per* LINDLEY, L.J., *ibid.*, at p. 287).

(*n*) *Casamajor* v. *Strode* (1823), 1 Sim. & St. 381.

(*o*) *Walton* v. *Johnson* (1848), 15 Sim. 352. As to the extension of the order to workmen or servants of the defendant, see p. 283, *post*.

(*p*) *Welsbach Incandescent Gas Light Co., Ltd.* v. *Daylight Incandescent Mantle Co., Ltd.* (1899), 16 R. P. C. 344, 356. But in these circumstances damages will not be awarded against him (*ibid.*).

(*q*) R. S. C., Ord. 3, r. 2; *Colebourne* v. *Colebourne* (1876), 1 Ch. D. 690; see *Savory* v. *Dyer* (1749), 1 Amb. 70.

(*a*) R. S. C., Ord. 28, r. 1; *Colebourne* v. *Colebourne*, *supra*.

(*b*) R. S. C., Appendix A, Part 3, s. 4; *Re Myers' Patent* (1882), 26 Sol. Jo. 371.

may, however, be granted at the hearing even though not claimed upon the indorsement on the writ (*c*), and after judgment a party who violates the spirit of the decree may be restrained from so doing on motion, and it is not necessary to commence a new action specifically claiming an injunction (*d*).

Service of writ out of jurisdiction.

578. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed whenever an injunction is sought as to anything to be done within the jurisdiction, or where any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not sought in respect thereof (*e*).

SUB-SECT. 2.—*On Motion or Summons* (*f*).

(i.) *Who may apply.*

Who may apply.

579. An application for an injunction may be made by any party, and, if the application is by the plaintiff, it may be made either *ex parte* (*g*) or on notice (*h*), but if it is by any other party it must be made after appearance and on notice to the plaintiff (*i*).

A defendant may before judgment apply for an injunction, and he may do so even if the plaintiff has already served him with notice of application for a like purpose (*j*). If the defendant's application is connected with the purpose of the plaintiff's action, he can apply for an injunction as soon as he has entered an appearance (*k*), but if the relief which he seeks does not arise out of the relief sought by the plaintiff, he cannot apply until he has delivered a counterclaim or issued a writ in a cross-action (*l*).

(ii.) *When Application may be made.*

When injunction will be granted.

580. An injunction will generally be granted only after a writ of summons has been issued (*m*). If, however, the circumstances of the case are very urgent (*n*), or where, owing to the offices of the

(*c*) *Blomfield* v. *Eyre* (1845), 8 Beav. 250, 259; *Goodman* v. *Kine* (1845), 8 Beav. 379; *Reynell* v. *Sprye* (1852), 1 De G. M. & G. 660, C. A.

(*d*) *Grand Junction Canal Co.* v. *Dimes* (1849), 17 Sim. 38; *Wright* v. *Atkyns* (1813), 1 Ves. & B. 313 (defendant restrained from committing waste).

(*e*) R. S. C., Ord. 11, r. 1 (f); and compare Yearly Practice of the Supreme Court, 1911, p. 69.

(*f*) *I.e.*, by motion in the Chancery Division and by summons in the King's Bench Division; see p. 274, *post*.

(*g*) See p. 276, *post*.

(*h*) See p. 275, *post*.

(*i*) R. S. C., Ord. 50, r. 6.

(*j*) *Sargant* v. *Read* (1876), 1 Ch. D. 600. In cases of this kind one order will be made on both motions, but the plaintiff will usually be given the conduct of the proceedings (*ibid.*).

(*k*) *Carter* v. *Fey*, [1894] 2 Ch. 541, C. A., distinguishing *Sargant* v. *Read*, *supra*; *Collison* v. *Warren*, [1901] 1 Ch. 812, C. A.

(*l*) *Carter* v. *Fey*, *supra*.

(*m*) R. S. C., Ord. 50, r. 6; but see the text, *supra*, as to defendant's application where the relief sought is incidental to or arises out of the relief sought by the plaintiff.

(*n*) *Thorneloe* v. *Skoines* (1873), L. R. 16 Eq. 126. In such a case the affidavit should be intituled in the contemplated action and also in the matter of the Judicature Acts (*Young* v. *Brassey* (1875), 1 Ch. D. 277).

SECT. 2. Application for Injunction.

court being closed, the issue of the writ is delayed (*o*), an injunction may be granted before the writ has been issued, upon the plaintiff undertaking to issue the writ at once.

In vacation.

581. An injunction may be obtained in vacation (*p*) as well as during term time, and whether the court is sitting or not. In the King's Bench Division injunctions are usually granted in chambers, but it is not the practice in the Chancery Division to grant injunctions in chambers when the courts are sitting (*a*).

Motion days.

582. In the King's Bench Division injunctions may be applied for *ex parte* or on a summons on any day (*b*). In the Chancery Division, strictly speaking, every day during term is a motion day (*c*), but the convenience of the court requires that motions should be confined to particular days. If, therefore, a party desires to have a motion heard on a day which is not a day appointed for hearing motions, and has sufficient reason, he should apply to the court for permission that the motion be heard on that day and give notice to the other party (*d*). The notice of motion must state that the motion is to be made by leave of the court, and, if it does not do so, the defendant may disregard it (*e*).

Saving motions.

583. In the Chancery Division, if a motion is not ready to be brought on the day for which notice has been given it can be saved (*f*). A motion may be saved by mentioning it to the court at any time before the court rises, notwithstanding that motions may have been finished (*g*). If it is not saved it will be treated as abandoned (*h*). To save a motion by special leave the leave of the court is required (*i*).

Early trial.

584. Upon an interlocutory application for an injunction the judge may, without going into the whole merits, make an order for an early trial (*k*).

(iii.) *Notice of Application.*

Title of application.

585. In the King's Bench Division the application for an injunction is usually made on summons in chambers (*l*). In the Chancery

(*o*) *Carr* v. *Morice* (1873), L. R. 16 Eq. 125; see also *Campana* v. *Webb* (1874), 22 W. R. 622; *Chanock* v. *Hertz* (1888), 4 T. L. R. 331.

(*p*) *Harborough* (*Lord*) v. *Wartnaby* (1844), 1 Ph. 364; *Chappell* v. *Davidson* (1855), 2 K. & J. 123, 125.

(*a*) *English* v. *Camberwell Vestry*, [1875] W. N. 256.

(*b*) A master has no jurisdiction (R. S. C., Ord. 54, r. 12 (e)).

(*c*) *Anon.* (1826), 4 L. J. (o. s.) (CH.) 204; *Chaffers* v. *Baker* (1854), 5 De G. M. & G. 482, C. A.

(*d*) *Anon.*, *supra*; *ex parte* applications may be made, however, at any time, according to the urgency of the case.

(*e*) *Hill* v. *Rimell* (1837), 8 Sim. 632; *Lloyd* v. *Gordon* (1818), 2 Coop. *temp.* Cott. 171, n.

(*f*) *Re Banwen Iron Co.* (1852), 17 Jur. 127.

(*g*) *Lapp* v. *Williams*, [1901] W. N. 91.

(*h*) *Cuthbert* v. *Fane* (1837), 1 Jur. 890; *Turner* v. *Turner* (1851), 15 Jur. 1165; and as to the costs, see p. 287, *post*.

(*i*) *Arthur* v. *Consolidated Kent Collieries Corporation* (1905), 49 Sol. Jo. 403.

(*k*) R. S. C., Ord. 50, r. 1A. As to appeals, see p. 283, *post*.

(*l*) See title PRACTICE AND PROCEDURE.

Division it is made on motion, and unless *ex parte*, is made on notice.

586. The notice of application must be properly intituled in the action (*m*).

Application.

An application on behalf of a relator is irregular ; it should be on behalf of the Attorney-General (*n*).

Service of notice.

587. A notice of motion or a summons for an injunction may be served by the plaintiff at any time after appearance has been entered by the defendant, or after the expiration of the time limited for that purpose if the defendant has failed to appear (*o*). Notice of motion or a summons may also, by leave of the court or a judge to be obtained *ex parte*, be served with the writ or at any time after service of the writ, and before the time limited for appearance (*p*).

The court can direct service of any notice out of the jurisdiction (*q*).

Length of notice.

588. Unless the court give special leave to the contrary, there must be at least two clear days between the service of the notice of motion and the day named in the notice for hearing (*r*). The same length of notice is required in the case of a summons (*s*).

Short notice of motion.

In a proper case leave to serve short notice of motion may be obtained. Express leave for the purpose must be given, and leave to serve notice of motion before appearance (*t*) does not include leave to serve short notice (*u*). Leave to serve short notice, or to serve notice before appearance, can be given only by the judge, and cannot be given by a master even during vacation (*v*).

Where leave to serve short notice is irregularly obtained, but the party served has not been injured by the irregularity, the court may disregard the irregularity and hear the motion on its merits (*w*).

Notice must contain reference to leave given.

589. When leave is obtained to serve notice of motion with the writ or before appearance (*x*), or to serve short notice of

(*m*) *Rowlatt* v. *Cattell* (1842), 2 Hare, 186.
(*n*) *A.-G.* v. *Wright* (1841), 3 Beav. 447.
(*o*) R. S. C., Ord. 52, r. 8.
(*p*) *Ibid.*, r. 9. A motion for an injunction upon notice and before appearance, or before the time for appearance has expired, cannot be made unless leave to give notice has been obtained, and the notice expresses that fact (*Cooke* v. —— (1826), 4 L. J. (o. s.) (CH.) 141).
(*q*) R. S. C., Ord. 11, r. 8 (a). It was formerly doubtful whether the court had jurisdiction to allow service of a notice of motion with the writ on a party out of the jurisdiction (*Manitoba and North-West Land Corporation* v. *Allan*, [1893] 3 Ch. 432), but in practice the court granted leave to make the service without prejudice to any question which might arise upon it (*Hersey* v. *Young*, [1894] W. N. 18, C. A., followed in *Overton & Co.* v. *Burn, Lowe, & Sons* (1896), 74 L. T. 776, C. A.).
(*r*) R. S. C., Ord. 52, r. 5. In the computation of the two days, Sundays, Christmas Day, and Good Friday are not to be reckoned (R. S. C., Ord. 64, r. 2).
(*s*) R. S. C., Ord. 54, r. 4 (e).
(*t*) See R. S. C., Ord. 52, r. 9.
(*u*) *Hart* v. *Tulk* (1849), 6 Hare, 611.
(*v*) *Conacher* v. *Conacher* (1881), 29 W. R. 230.
(*w*) *Dawson* v. *Beeson* (1882), 22 Ch. D. 504, C. A.; see R. S. C., Ord. 70, r. 1.
(*x*) *Chambers* v. *Toynbee* (1864), 12 W. R. 1100.

SECT. 2. Application for Injunction.

motion (*a*), the party obtaining it should take good care that his evidence is ready before the day for hearing mentioned in the notice, and the fact that such leave has been given must distinctly appear on the face of the notice. If the notice does not state that leave has been obtained, and the defendant appears and objects, the court may give leave to amend at once and to serve the amended notice then and there, and proceed to try the case on its merits (*b*).

Costs.

Costs may be given though not asked for in the notice of motion (*c*).

Service of notice of motion.

590. Where the defendant has made default in entering appearance, or no address for service is given (*d*), a notice may be served by filing (*e*). If, on the hearing of an application, the court is of opinion that any person to whom notice has not been given ought to have or to have had such notice, it may either dismiss the application or adjourn the hearing in order that such notice may be given (*f*). If there is more than one defendant, all the defendants who are interested in the application should be served (*g*).

Amending.

591. The amendment of the statement of claim pending notice of motion operates as an abandonment of the notice (*h*), unless the plaintiff obtains leave to amend without prejudice to the pending notice (*i*).

(iv.) *Application Ex parte.*

In general.

592. An injunction will not, in general, be granted without notice, but the court, if satisfied that the delay caused by proceeding in the ordinary way might entail serious mischief, may make an order *ex parte* upon such terms as it thinks just (*k*).

Application for an injunction may be made by a plaintiff *ex parte* (*l*).

(*a*) *Harris* v. *Lewis* (1844), 8 Jur. 1063; *Dawson* v. *Beeson* (1882), 22 Ch. D. 504, C. A.

(*b*) *Heywood* v. *Wait* (1870), 18 W. R. 205.

(*c*) *Clark* v. *Jaques* (1849), 11 Beav. 623; *Butler* v. *Gardener* (1850), 12 Beav. 525; but in *Pratt* v. *Walker* (1854), 19 Beav. 261, where the respondent did not appear, ROMILLY, M.R., refused costs, as they were not asked for by the notice of motion.

(*d*) As required by R. S. C., Ords. 4 and 12.

(*e*) R. S. C., Ord. 67, r. 4.

(*f*) R. S. C., Ord. 52, r. 6.

(*g*) *Service* v. *Castaneda* (1845), 9 Jur. 367.

(*h*) *Martin* v. *Fust* (1836), 8 Sim. 199; *Gouthwaite* v. *Rippon* (1838), 1 Beav. 54; *Monypenny* v. *Dering* (1852), 1 W. R. 99; see *Smith* v. *Dixon* (1864), 12 W. R. 934; *London and Blackwall Rail. Co.* v. *Limehouse District Board of Works* (1856), 3 K. & J. 123.

(*i*) *Martin* v. *Fust, supra; Caldwell* v. *Pagham Harbour Reclamation Co.* (1876), 2 Ch. D. 221; see *Child* v. *Douglas* (1854), Kay, 560, 574. In *Rawlings* v. *Lambert* (1860), 1 John. & H. 458, leave was given after a demurrer had been allowed.

(*k*) R. S. C., Ord. 52, r. 3; and see *Lloyds Bank, Ltd.* v. *Medway Upper Navigation Co.*, [1905] 2 K. B. 359, C. A.; but an injunction will not be granted *ex parte* where its effect will be to stop a great trading concern (*Crowder* v. *Tinkler* (1816), 19 Ves. 617). In *Anon.* (1857), 3 Jur. (N. S.) 685, an *ex parte* injunction was granted to restrain the defendant from doing certain acts which he had agreed not to do if a certain sum of money was paid, although the plaintiff was not prepared to pay the full sum.

(*l*) R. S. C., Ord. 50, r. 6. See p. 273, *ante*. The granting of *ex parte*

SECT. 2. Application for Injunction.

In an urgent case the order may be made before service (*m*), and even before issue (*n*), of the writ. Where leave is sought to issue a writ for service out of the jurisdiction, and the writ asks for an injunction which is applied for *ex parte*, the order giving leave to serve the writ may also direct that the injunction do issue from and after the issuing of the writ (*o*).

Ex parte order.

An *ex parte* injunction will not be granted if the defendant has appeared (*p*), unless the case is very pressing (*q*). Where an *ex parte* application is applied for after appearance, the fact that appearance has been entered must be stated in the affidavit in support (*r*); otherwise the injunction may be dissolved. In the King's Bench Division when an *interim* injunction is granted *ex parte* the judge usually gives leave to issue a summons to continue the order until trial.

Effect of non-appearance.

A defendant who has had notice of an application for an injunction, which he is willing and ready to meet, ought not to have that injunction issued against him *ex parte*. If, from the other engagements of counsel or from the pressure of other business on the court, the plaintiff cannot bring on his application, the inconvenience of this should fall on him and not on the defendant, as, otherwise, the latter would be harassed and punished as a wrongdoer without an opportunity of being heard (*a*).

Duty of plaintiff.

593. The court sometimes grants an *interim* order in the nature of an injunction restraining the defendant until after a named day or until further order. An order of this kind is usually

Interim orders.

injunctions is the exercise of very extraordinary jurisdiction, and therefore the time at which the plaintiff first had notice of the act complained of will be looked at very carefully in order to prevent an improper order being made against a party in his absence, and if the applicant has acquiesced for some time, it will not be granted (*Mexborough (Earl)* v. *Bower* (1843), 7 Beav. 127, 131).

(*m*) *Re H.'s Estate, H.* v. *H.* (1875), 1 Ch. D. 276; *Colebourne* v. *Colebourne* (1876), 1 Ch. D. 690; *Brand* v. *Mitson (otherwise Brand)* (1876), 24 W. R. 524; but the court will not grant an injunction to prevent the transfer of stocks till after the defendant has appeared or is in contempt for want of appearance, and then only upon notice (*Doolittle* v. *Walton* (1771), 2 Dick. 442).

(*n*) See p. 273, *ante*.

(*o*) *Young* v. *Brassey* (1875), 1 Ch. D. 277.

(*p*) *Collard* v. *Cooper* (1821), Madd. & G. 190; *Perry* v. *Weller* (1827), 3 Russ. 519; *Langham* v. *Great Northern Rail. Co.* (1847), 1 De G. & Sm. 486, 497.

(*q*) *Allard* v. *Jones* (1809), 15 Ves. 605; *Harrison* v. *Cockerell* (1817), 3 Mer. 1; *Acraman* v. *Bristol Dock Co.* (1830), 1 Russ. & M. 321; *Petley* v. *Eastern Counties Rail. Co.* (1839), 8 Sim. 483; *Bell* v. *Hull and Selby Rail. Co.* (1840), 1 Ry. & Can. Cas. 616, 623. In *Acraman* v. *Bristol Dock Co.*, *supra*, counsel, who had been instructed to oppose the motion, although no notice had been given, was allowed to be heard. A special injunction (such as one to restrain navigation of ships) will not be granted *ex parte* after appearance has been entered (*Marasco* v. *Boiton* (1750), 2 Ves. Sen. 112).

(*r*) *Harrison* v. *Cockerell, supra; Randall* v. *Commercial Rail. Co.* (1839), 8 L. J. (CH.) 252; *Sutton* v. *Mumford* (1830), 2 Coop. *temp.* Cott. 171, n.; *Mexican Co. of London* v. *Maldonado*, [1890] W. N. 8. It would appear from *Mexican Co. of London* v. *Maldonado, supra*, that, although the fact is not stated in the affidavit in support, it would be sufficient if the judge is informed of the fact at the hearing.

(*a*) *Graham* v. *Campbell* (1878), 7 Ch. D. 490, 493, C. A.

SECT. 2. Application for Injunction.

granted upon *ex parte* application, but may be granted on an application upon notice (*b*). In the Chancery Division the named day is generally the next motion day, but an earlier day may be named; and the plaintiff is usually given liberty by the order to serve notice of motion for the day named (*c*). Sometimes liberty is reserved to the defendant to move to discharge the order before the named day, with liberty to the plaintiff to move similarly for an injunction. Where in these circumstances simultaneous applications are made on the part of the plaintiff for an injunction in the terms of the order and on the part of the defendant to discharge the order, the plaintiff has the right to begin (*d*). *Interim* orders are not exactly like *ex parte* injunctions which put the other side to the necessity of coming to the court to dissolve them, and in many respects they are a convenient course of proceeding (*e*).

Meaning of "or further order."

When an *interim* order is made to extend over a certain day or until further order, the words "or further order" mean an order made before the day named (*f*). There must be no delay in applying for an *interim* order (*g*); but the court, although refusing such an order, may give leave to serve short notice of motion, notwithstanding that no appearance has been entered (*h*).

SECT. 3.—*Evidence.*

In general.

594. Upon a motion or summons for an injunction evidence (*i*) may be given by affidavit, but the court may on the application of either party order the attendance for cross-examination of the person making the affidavit (*k*).

On *ex parte* applications all material facts must be disclosed.

595. If the application for an interlocutory injunction or *interim* order is made *ex parte*, the applicant must state his case fully and fairly to the court, and must disclose all material facts (*l*). The affidavits in support of an *ex parte* application should also always state the precise time at which the plaintiff or those acting for him became aware of the threatened injury (*m*), and should show, in effect, either that notice to the defendant would be mischievous or that the matter is so urgent that, if notice were served, the

(*b*) In an urgent case an interim order may be granted when the other side has been served with notice of motion but has not had an opportunity of answering the affidavits (*Fenwick* v. *East London Rail. Co.* (1875), L. R. 20 Eq. 544, 547); see note (*k*), p. 280, *post*.

(*c*) 1 Seton, Judgments and Orders, 6th ed., p. 518.

(*d*) *Fraser* v. *Whalley*, *Gartside* v. *Whalley* (1864), 2 Hem. & M. 10.

(*e*) *Fuller* v. *Taylor* (1863), 32 L. J. (CH.) 376, *per* WOOD, V.-C., at p. 377.

(*f*) *Bolton* v. *London School Board* (1878), 7 Ch. D. 766. It cannot be extended after the named day except with the leave of the court (*ibid.*).

(*g*) *Greer* v. *Bristol Tanning Co.* (1885), 2 R. P. C. 268.

(*h*) *Ibid.*

(*i*) See, generally, title EVIDENCE, Vol. XIII., pp. 415 *et seq.*

(*k*) R. S. C., Ord. 38, r. 1; and see also rr. 28 and 29 (*ibid.*).

(*l*) *A.-G.* v. *Liverpool Corporation* (1835), 1 My. & Cr. 171; *Castelli* v. *Cook* (1849), 7 Hare, 89, 94; *Dalglish* v. *Jarvie* (1850), 2 Mac. & G. 231, 243; *Fuller* v. *Taylor*, *supra* (*interim* order); *Schmitten* v. *Faulks*, [1893] W. N. 64; and see pp. 288, 298, *post*.

(*m*) *Calvert* v. *Gray* (1830), 2 Coop. *temp.* Cott. 171, n.

mischief would have been done before the injunction could be obtained. Unless the affidavits show the above, the application may be directed to stand over, and notice of it to be served on the defendant (*n*).

Case on hearing must correspond with case pleaded.

At the hearing, the case put forward must correspond with the case set out in the statement of claim, if any (*o*), and the plaintiff will not be allowed, when he puts forward prominently and relies upon a given case, and fails upon that case, to spell out another and say he might have framed his case so as to show a title to the relief asked (*p*). The court never grants an injunction on general complaints, and general words in a notice of motion can only be justified by establishing a specific case of injury (*q*).

Affidavit.

The affidavit may be made by any person having sufficient knowledge of the facts (*a*). It is usually made by the plaintiff, and, if no sufficient reason is assigned for its not being so made, the order may be refused (*b*). If, on an *ex parte* application, the affidavit is not sufficiently positive, notice of the application may be ordered to be given (*c*). The affidavit should not, as a rule, be sworn until after the issue of the writ (*d*), but in exceptional cases the court may grant an *interim* order, although the affidavit was sworn before the issue of the writ (*e*). In such cases the court now requires the affidavit to be re-sworn and filed, and the plaintiff is required to give an undertaking to have this done (*f*).

Filing of affidavits.

All affidavits must be filed (*g*). In the Chancery Division affidavits may be filed at any time before the motion is actually heard (*h*), but the court will endeavour to prevent either party

(*n*) Practice Note (1823), 1 L. J. (O. S.) (CH.) 3.

(*o*) *Butts* v. *Matthews* (1836), 5 L. J. (CH.) 134; *Burton* v. *Blakemore* (1838), 2 Jur. 1062; *Hertz* v. *Union Bank of London* (1854), 1 Jur. (N. S.) 127. If the statement of claim states that a certain mode of operation will inflict injury, and, after giving notice of motion, that mode of operation is changed and another adopted, the proper course is to amend the statement of claim (*Hertz* v. *Union Bank of London, supra*).

(*p*) *Whitworth* v. *Gaugain* (1841), Cr. & Ph. 325; *Castelli* v. *Cook* (1849), 7 Hare, 89. Nor can a party who might have brought forward his whole case at once, but who brings forward a part only, when that fails, remodel his case and rely on a different equity (*Barker* v. *North Staffordshire Rail. Co.* (1848), 5 Ry. & Can. Cas. 401; and see *Powell* v. *Lassalette* (1822), Jac. 549, 551).

(*q*) *Hertz* v. *Union Bank of London, supra.*

(*a*) *Kenworthy* v. *Accunor* (1819), 3 Madd. 550; *Byron* (*Lord*) v. *Johnston* (1816), 2 Mer. 29; *Hamilton* v. *Board* (1863), 1 New Rep. 379, C. A.

(*b*) *Spalding* v. *Keely* (1835), 7 Sim. 377; S. C. *sub nom. Spalding* v. *Reiley* (1835), 4 L. J. (CH.) 169; see *Scotson* v. *Gaury* (1841), 1 Hare, 99.

(*c*) *Byron* (*Lord*) v. *Johnston, supra.*

(*d*) *Francome* v. *Francome* (1865), 11 Jur. (N. S.) 123; see *Bowen* v. *Bowen* (1873) 7 I. R. Eq. 251.

(*e*) *Fennall* v. *Brown* (1854), 18 Jur. 1051; *Green* v. *Prior*, [1886] W. N. 50.

(*f*) *Green* v. *Prior, supra.*

(*g*) R. S. C., Ord. 38, r. 10, and stamped (*ibid.*, r. 15); Yearly Practice of the Supreme Court, 1911, pp. 530, 531. As to the form and contents of affidavits generally, see title EVIDENCE, Vol. XIII., p. 625; as to filing and office copies of affidavits, *ibid.*, p. 629; and as to copies of affidavits for parties, see R. S. C., Ord. 66, r. 7 (f) (i.); Yearly Practice of the Supreme Court, 1911, pp. 1095, 1096.

(*h*) *Ex parte Leicester* (1801), 6 Ves. 429, 432; *Munro* v. *Wivenhoe and Brightlingsea Rail. Co.* (1865), 4 De G. J. & Sm. 723, 736, C. A.

SECT. 3. **Evidence.**

from gaining any advantage from filing affidavits at the last moment (*i*), and will usually order the motion to stand over until the next motion day in order to enable the other party to answer the affidavits. Sometimes an *interim* order will be granted in the meantime (*k*). When the affidavits have been filed, office copies must be in court when the injunction is moved for (*l*); but, where there is no time to get the affidavit filed before the application, the injunction may be granted upon an undertaking to file the affidavit (*m*), and, in vacation, the court will sometimes take affidavits into its own custody and consider them as filed (*n*). Except by leave of the court, no order made *ex parte* in court founded on any affidavit is of any force, unless the affidavit is actually made before the order is applied for and produced or filed at the time of making the motion (*o*). Where, on a motion, the respondent does not appear, affidavits of service can be sworn and filed before the order is drawn up (*p*).

Offices copies of affidavits filed must be in court.

In the King's Bench Division the affidavits are not usually filed before the summons comes on, but are simply produced then and read and subsequently filed.

No fresh evidence after motion opened.

After a motion has been opened no fresh evidence can be admitted without the leave of the court (*q*), which will be granted only in special cases (*r*). When a motion is ordered to stand over on certain terms till the hearing, no new evidence can be filed on the motion (*s*). But, on an application by way of appeal from an order granting an interlocutory injunction, the respondent may adduce fresh evidence in support of the injunction (*t*). The court may take notice of an order made in previous proceedings in the action, and of what passed at the hearing (*a*).

A plain case must be made out.

596. To entitle a plaintiff to an interlocutory injunction he must either, by proof or admission from the other party, make out a plain case (*b*). If he makes out a *primâ facie* case which

(*i*) *Carew* v. *Yates* (1852), 1 W. R. 11.

(*k*) *Carew* v. *Yates*, *supra*; *Besemeres* v. *Besemeres* (1853), Kay, Appendix, xvii.

(*l*) *Jackson* v. *Cassidy* (1841), 10 Sim. 326; *Elsey* v. *Adams* (1863), 4 Giff. 398.

(*m*) *Niemann* v. *Harris*, [1870] W. N. 6. When an affidavit is used on a motion but is not filed until afterwards, it may be entered in the order as read, even though the fact that it has not been filed was not brought to the attention of the court, provided that it does not interfere with the date of the order, as where for example it is filed on the same day (*Re King & Co.'s Trade-Mark*, [1892] 2 Ch. 462, C. A.).

(*n*) *A.-G.* v. *Lewis* (1845), 8 Beav. 179; *Carr* v. *Morice* (1873), L. R. 16 Eq. 125.

(*o*) R. S. C., Ord. 38, r. 19.

(*p*) 28 Sol. Jo. (1884) 591 (memo. issued to registrars). This was not the case formerly; see *Seear* v. *Webb* (1883), 25 Ch. D. 84, C. A., where the old practice is discussed.

(*q*) *Smith* v. *Swansea Dock Co.* (1852), 9 Hare, Appendix, xx., n.; *Bird* v. *Lake* (1863), 1 Hem. & M. 111, 119. This rule extends to documents which it is proposed to verify *vivâ voce* by the attesting witness (*Bird* v. *Lake*, *suprà*).

(*r*) *East Lancashire Rail. Co.* v. *Hattersley* (1849), 8 Hare, 72, 86; *Anderton* v. *Yates* (1850), 15 Jur. 833.

(*s*) *Singer* v. *Audsley* (1872), L. R. 13 Eq. 401.

(*t*) *Pole* v. *Joel* (1858), 2 De G. & J. 285, C. A.; see *Const* v. *Barr* (1826), 2 Russ. 161; R. S. C., Ord. 58, r. 4.

(*a*) *Lister* v. *Leather* (1857), 3 Jur. (N. S.) 433.

(*b*) *Potts* v. *Potts* (1825), 3 L. J. (O. S.) (CH.) 176; and see *De Tastet* v.

is not denied by the defendant, an injunction will be granted (*c*). It is not sufficient for the defendant by his affidavit to make a general denial of the plaintiff's rights. In order to defeat the plaintiff's claim, he must traverse the whole facts on which the plaintiff's equity depends (*d*).

Discretionary power of court as to evidence.

597. The court has a discretionary power of acting upon such evidence as may be before it at the time, and will not allow a motion to stand over in order to enable a party to examine a witness *vivâ voce*, if it considers that the application is made in order to create delay (*e*), or that there is sufficient evidence before it to enable it to deal with the motion (*f*).

Where the evidence is wholly conflicting, the court may order the case to stand over, in order that experiments may be made, and, for that purpose, may appoint an expert to make the necessary experiments and report to the court on the result (*g*). The expert so appointed assists the court in a *quasi*-judicial capacity, and the court will not allow him to be called as a witness (*h*). Where a plaintiff has proved his right to an injunction against a nuisance, it is no part of the duty of the court to refer to an expert the question how the nuisance can best be abated (*i*).

Detention, inspection, and preservation of property.

598. The court may, on the application of any party, make an order for the detention, preservation, or inspection of any property or thing, being the subject of any cause or matter, and authorise samples to be taken or experiments tried (*k*). A judge may also inspect any property or thing concerning which any question may arise (*l*). An application for an order (*m*) for the

Bordenave (1882), Jac. 516; *Sanxter* v. *Foster* (1841), Cr. & Ph. 302; *M'Curdy* v. *Noak* (1847), 17 L. J. (CH.) 165 (where injunctions were refused).

(*c*) *Bell* v. *Wilson* (1865), 34 L. J. (CH.) 572.

(*d*) *Pyecroft* v. *Pyecroft* (1854), 2 Sm. & G. 326; see *Denys* v. *Locock* (1837), 3 My. & Cr. 205; *Palin* v. *Gathercole* (1844), 1 Coll. 565.

(*e*) *Normanville* v. *Stanning* (1853), 10 Hare, Appendix, xx.

(*f*) *Mayer* v. *Spence* (1860), 1 John. & H. 87.

(*g*) *Case* v. *Midland Rail. Co.* (1859), 27 Beav. 247; *Cartwright* v. *Last* (1876), 1 Seton, Judgments and Orders, 6th ed., p. 401; *Craven* v. *Kaye* (1876), 1 Seton, Judgments and Orders, 6th ed., p. 577; *Broder* v. *Saillard* (1876), 2 Ch. D. 692, 694; *Badische Anilin und Soda Fabrik* v. *Levinstein* (1883), 24 Ch. D. 156.

(*h*) *Broder* v. *Saillard* (1876), 24 W. R. 456.

(*i*) *A.-G.* v. *Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146.

(*k*) R. S. C., Ord. 50, r. 3. Under this rule the court will grant an *interim* injunction to restrain a defendant from ceasing to pump water out of a mine in order to preserve the mine from obstruction (*Strelley* v. *Pearson* (1880), 15 Ch. D. 113), and will also grant an injunction to protect a fund pending an appeal (*Polini* v. *Gray*, *Sturla* v. *Freccia* (1879), 12 Ch. D. 438, C. A.). The judge has a discretion as to how the costs incurred under an order under this rule should be borne, and consequently the party who is ordered to pay such costs has no right to appeal from such order, without leave (*Mitchell* v. *Darley Main Colliery Co.* (1883), 10 Q. B. D. 457).

(*l*) R. S. C., Ord. 50, r. 4. The conclusion to which a judge may come on a view by him under this rule is not of itself sufficient to support an injunction. He must also be satisfied by independent evidence that the case is one for an injunction (*London General Omnibus Co., Ltd.* v. *Lavell*, [1901] 1 Ch. 135, C. A.; but see *Re Bourne's Trade-marks*, *Bourne* v. *Swan and Edgar, Ltd.*, [1903] 1 Ch. 211, where the former case is commented on).

(*m*) Under R. S. C., Ord. 50, r. 3.

SECT. 3. **Evidence.**

detention, inspection or preservation of any property may be made by any party (*n*). In a case of emergency the order may be made *ex parte* (*o*). An order for inspection will not be granted unless the court considers that the nature of the case requires it (*p*). In a proper case a plaintiff may be given liberty to enter upon the land belonging to the defendant, and to excavate the soil thereof for the purposes of inspection (*q*).

SECT. 4.—*The Order.*

Language of order.

599. The right to an injunction being founded on the fact that injury is accruing to the plaintiff, that fact should be mentioned in the order (*r*). The court should see that the language of its order is such as to render it quite plain what it permits and what it prohibits (*s*). An order which only prohibits a man from doing what he has no authority to do, without informing him what are the limits of such authority, leaves the question undecided and to be discussed on a motion for the breach of the injunction, and is irregular (*t*).

If, however, adequate protection cannot be given in any other way, an injunction may be granted in extensive terms (*u*). An injunction to protect a right which is limited in duration should not be perpetual in form (*v*). An interlocutory injunction cannot exceed the relief claimed by the statement of claim (*a*).

Form of order.

600. According to the present practice the form of an interlocutory order is "until judgment or further order" (*b*).

Although the injunction is claimed against the defendant alone,

(*n*) As to when the application may be made, see R. S. C., Ord. 50, r. 6.

(*o*) *Hennessy* v. *Bohmann, Osborne, & Co.*, [1877] W. N. 14.

(*p*) *Barlow* v. *Bailey* (1870), 18 W. R. 783 (where the order was refused on the ground that proof of the nuisance complained of could be obtained from external sources).

(*q*) *Lumb* v. *Beaumont* (1884), 27 Ch. D. 356.

(*r*) *Lingwood* v. *Stowmarket Papermaking Co. etc., Ltd.* (1865), 13 L. T. 540. As to orders generally, see title JUDGMENTS AND ORDERS.

(*s*) *Low* v. *Innes* (1864), 4 De G. J. & Sm. 286; *Hackett* v. *Baiss* (1875), L. R. 20 Eq. 494, 499; *A.-G.* v. *Staffordshire County Council*, [1905] 1 Ch. 336, 342.

(*t*) *Cother* v. *Midland Rail. Co.* (1848), 2 Ph. 469, 471; *Dover Harbour (Warden etc.)* v. *London, Chatham and Dover Rail. Co.* (1861), 3 De G. F. & J. 559, 564, C. A.; *Parker* v. *First Avenue Hotel Co.* (1883), 24 Ch. D. 282, 286, C. A.; see *A.-G.* v. *Boyle* (1864), 10 L. T. 290. Liberty will not be given to the plaintiff to apply to the court in the event of the defendant doing an act which will infringe the plaintiff's legal right, for if there is no present reason for the court's interference it would be premature, and if on the other hand reason thereafter arises, it must be the subject of another suit (*Low* v. *Innes*, *supra*).

(*u*) *A.-G.* v. *London and South Western Rail. Co.* (1849), 3 De G. & Sm. 439, 445; *North Eastern Rail. Co.* v. *Crossland* (1862), 2 John. & H. 565, 580; *Elliot* v. *North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333.

(*v*) *Daw* v. *Eley* (1867), L. R. 3 Eq. 496, 508 (patent); *Savory, Ltd.* v. *Gyptican Oil Co., Ltd.* (1904), 48 Sol. Jo. 573 (copyright).

(*a*) *Munro* v. *Wivenhoe and Brightlingsea Rail. Co.* (1865), 4 De G. J. & Sm. 723, C. A.

(*b*) 1 Seton, Judgments and Orders, 6th ed., p. 518. A date should be named in an order restraining proceedings on a bill of sale (*Re Johnstone, Ex parte Abrams* (1884), 50 L. T. 184); and see p. 278, *ante*.

the order will, if necessary, be extended, as of course, to his workmen, servants and agents (*c*), or solicitors (*d*), but not to his tenants (*e*). The memorandum (*f*) to be indorsed on a judgment or order requiring an act to be done need not be indorsed on orders purely prohibitive (*g*).

When defendant does not appear.

601. If, when an application is made, the defendant does not appear, the order may be made on an affidavit of service (*h*). Such an order is, however, taken subject to every objection (*i*), and will be discharged if there is any irregularity in the notice of motion (*k*), or the service, or the affidavit (*l*); or if the notice does not ask for costs and an order for costs is taken (*m*); or if the order goes beyond (*n*), or departs from (*o*) the notice of motion in any respect.

Service of order.

602. As soon as the order has been drawn up (*p*) it should be served personally (*q*). In very pressing cases notice in writing that the order has been made, personally served upon the defendant, will be sufficient service (*r*). Notice may also be given by telegram (*s*).

Appeal.

603. No leave to appeal from an interlocutory order or judgment granting or refusing an injunction is necessary (*t*).

(*c*) *Humphreys* v. *Roberts* (1828), 1 Seton, Judgments and Orders, 6th ed., p. 521; see also *Freeman* v. *Burke* (1824), 7 I. Eq. R. 282.

(*d*) *Seaward* v. *Paterson*, [1897] 1 Ch. 545, C. A., *per* NORTH, J., at p. 522.

(*e*) *Hodson* v. *Coppard* (1860), 9 W. R. 9; nor, where the defendant is the tenant, to his under-tenants (*Norbury (Lord)* v. *Alleyne* (1838), 1 Dr. & Wal. 337). In *A.-G.* v. *Ancaster (Duke)* (1737), 1 Dick. 68, however, apparently, an injunction was granted against a tenant in possession, though not a party, to stay waste.

(*f*) By R. S. C., Ord. 41, r. 5.

(*g*) *Selous* v. *Croydon Rural Sanitary Authority* (1885), 53 L. T. 209; *Hudson* v. *Walker* (1894), 64 L. J. (CH.) 204.

(*h*) *Davidson* v. *Leslie* (1845), 9 Beav. 104; *Angier* v. *May* (1855), 3 W. R. 330.

(*i*) *Salomon* v. *Stalman* (1841), 4 Beav. 243.

(*k*) See *Moody* v. *Hebberd* (1847), 11 Jur. 941 (a motion to dispauper the plaintiff).

(*l*) *Salomon* v. *Stalman*, *supra*.

(*m*) *Pratt* v. *Walker* (1854), 19 Beav. 261.

(*n*) *Re Dover, Hastings and Brighton Junction Rail. Co., Ex parte Carew* (1854), 23 L. J. (CH.) 761, C. A.

(*o*) *Hutton* v. *Hepworth* (1848), 6 Hare, 315.

(*p*) There should be no delay, as otherwise the court may require notice of application to draw up the order to be given to the defendant (*Bateman* v. *Wiatt* (1849), 11 Beav. 587).

(*q*) *Gooch* v. *Marshall* (1860), 8 W. R. 410. In *Holgate* v. *Grantham* (1577), Cary, 58, service at the defendant's house, and in *Pearce* v. *Crutchfield* (1807), 14 Ves. 206, service at the defendant's last place of abode, though apparently shut up, was held to be good. As to how personal service is effected, see R. S. C., Ord. 67, r. 5; Yearly Practice of the Supreme Court, 1911, p. 1098. In a proper case substituted service may be ordered (R. S. C., Ord. 67, r. 6; see *Kirkman* v. *Honnor* (1843), 6 Beav. 400; *Heald* v. *Hay* (1861), 9 W. R. 369).

(*r*) *Kimpton* v. *Eve* (1813), 2 Ves. & B. 349; *Vansandau* v. *Rose* (1820), 2 Jac. & W. 264.

(*s*) *Re Bishop, Ex parte Langley, Ex parte Smith* (1879), 13 Ch. D. 110, C. A.; *D.* v. *A. & Co.*, [1900] 1 Ch. 484, 487.

(*t*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (1) b (ii.). See *Bright (Charles) & Co.* v. *River Plate Construction Co.* (1901), 17 T. L. R. 708, C. A.

SECT. 4. The Order.

A party wishing to appeal must do so within fourteen days (*u*).

SECT. 5.—*Undertaking as to Damages.*

An implied term.

The undertaking.

604. An undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for it, and it ought to be required on every interlocutory order (*a*). By the undertaking the party obtaining the order undertakes to abide by any order as to damages which the court may make in case it should afterwards be of opinion that the defendant has by reason of the order sustained any, which such party ought to pay (*b*). As a general rule, the benefit of the undertaking applies to all the defendants, although one or more only are restrained (*c*).

Effect of undertaking.

605. The undertaking remains in force notwithstanding the dismissal of the action (*d*) or its discontinuance (*e*), and when the plaintiff ultimately fails on the merits the defendant is entitled to an inquiry as to the damages sustained by reason of the interlocutory injunction (*f*), unless there are special circumstances (*g*). The undertaking applies, even though the plaintiff has not been guilty of misrepresentation, suppression, or other default in obtaining the injunction (*h*), and is equally enforceable, whether the mistake in granting the injunction was in point of law or in point of fact (*i*).

Court cannot compel plaintiff to give undertaking.

606. The court cannot compel the plaintiff to give an undertaking, but it can refuse to grant an injunction unless he will give

(*u*) R. S. C., Ord. 58, r. 15.

(*a*) *Chappell* v. *Davidson* (1856), 8 De G. M. & G. 1, C. A.; *Tuck* v. *Silver* (1859), John. 218; *Adamson* v. *Wilson* (1864), 10 L. T. 24; *Wakefield* v. *Buccleugh* (*Duke*) (1865), 11 Jur. (N. S.) 523; *Teign Valley Rail. Co.* v. *Southwood* (1871), 19 W. R. 690; *Graham* v. *Campbell* (1878), 7 Ch. D. 490, C. A.; *Smith* v. *Day* (1882), 21 Ch. D. 421, C. A. (in which the history and meaning of these undertakings are discussed); see *Howard* v. *Press Printers, Ltd.* (1904), 74 L. J. (CH.) 100, C. A. In a clear case of fraud the undertaking may not be required (see *Ingram* v. *Stiff* (1859), cited in note to *Tuck* v. *Silver*, *supra*, at p. 220). Whenever an undertaking to the court is given in lieu of an interlocutory order, there will be inserted in the order a cross undertaking in damages by the applicant, unless the contrary is agreed and expressed at the time (Practice Note, [1904] W. N. 203; *Oberrheinische Metallwerke, G. M. B. H.* v. *Cocks*, [1906] W. N. 127). Formerly there was no general practice to this effect (*Howard* v. *Press Printers, Ltd.*, *supra*).

(*b*) See *Newby* v. *Harrison* (1861), 3 De G. F. & J. 287, and for form of order, 1 Seton, Judgments and Orders, 6th ed., p. 518.

(*c*) *Tucker* v. *New Brunswick Trading Co. of London* (1890), 44 Ch. D. 249, C. A.

(*d*) *Newby* v. *Harrison*, *supra*.

(*e*) *Newcomen* v. *Coulson* (1878), 7 Ch. D. 764.

(*f*) *Kino* v. *Rudkin* (1877), 6 Ch. D. 160, 165; *Ross* v. *Buxton*, [1888] W. N. 55.

(*g*) *Griffith* v. *Blake* (1884) 27 Ch. D. 474, C. A.; see *Bingley* v. *Marshall* (1863), 11 W. R. 1018, where the inquiry was refused; see also p. 286, *post*.

(*h*) *Griffith* v. *Blake*, *supra*, dissenting from the *dictum* of JESSEL, M.R., to the contrary in *Smith* v. *Day* (1882), 21 Ch. D. 421, C. A.

(*i*) *Hunt* v. *Hunt* (1884), 54 L. J. (CH.) 289.

SECT. 5. Undertaking as to Damages.

one (*k*). The court can, however, dispense with the undertaking; but this will only be done in very special circumstances (*l*), as, for example, when the order is in the nature of a final order and is not intended to be open to review at any time thereafter (*m*).

Attorney-General not usually required to undertake.

607. The court will not as a rule require the Attorney-General to give an undertaking as to damages (*n*), but where the person applying for an injunction is a Secretary of State an undertaking will, it seems, be required (*o*).

By whom undertaking given.

Married woman.

Corporation.

Liquidator.

608. If the plaintiff is out of the jurisdiction, the undertaking must be given by his solicitor or some other responsible person (*p*). An undertaking as to damages may be given by a married woman (*q*), even though she has no separate property (*r*). When the applicant is a limited company (*s*) or other corporation (*t*), the undertaking should be given by counsel on behalf of the corporation, and it is not necessary for any director or officer of the corporation to sign the registrar's book (*a*). There is no established practice that, where a company is in liquidation, the liquidator must give a personal undertaking as to damages (*b*). The undertaking should be given by counsel or by the parties appearing in person (*c*), and, when given, it forms part of the order (*d*); but where the injunction is granted during vacation without the attendance of counsel the undertaking

(*k*) *Tucker* v. *New Brunswick Trading Co. of London* (1890), 44 Ch. D. 249, C. A.; *A.-G.* v. *Albany Hotel Co.*, [1896] 2 Ch. 696, C. A.; *Howard* v. *Press Printers, Ltd.* (1904), 74 L. J. (CH.) 100, C. A.

(*l*) *A.-G.* v. *Albany Hotel Co., supra.*

(*m*) *Fenner* v. *Wilson*, [1893] 2 Ch. 656 (order restraining threats).

(*n*) *A.-G.* v. *Albany Hotel Co., supra.*

(*o*) *Her Majesty's Principal Secretary of State for War* v. *Chubb* (1880), 43 L. T. 83; see *A.-G.* v. *Albany Hotel Co., supra*, at p. 704.

(*p*) *Solignac* v. *Durden* (1859), cited in 1 Seton, Judgments and Orders, 6th ed., p. 522.

(*q*) *Hunt* v. *Hunt* (1884), 54 L. J. (CH.) 289; *Re Prynne* (1885), 53 L. T. 465; see *Holden* v. *Waterlow* (1866), 15 W. R. 139; and title HUSBAND AND WIFE, Vol. XVI., p. 455.

(*r*) *Pike* v. *Cave* (1893), 62 L. J. (CH.) 937. Where there is a real case for an injunction the undertaking of the plaintiff is sufficient, notwithstanding that it may be of no value (*ibid.*).

(*s*) *Manchester and Liverpool Banking Co.* v. *Parkinson* (1888), 60 L. T. 47; see *East Molesey Local Board* v. *Lambeth Waterworks Co.*, [1892] 3 Ch. 289, 300, C. A.

(*t*) *East Molesey Local Board* v. *Lambeth Waterworks Co., supra;* see title COMPANIES, Vol. V., p. 326.

(*a*) Formerly companies and corporations could not give their undertakings merely by counsel; somebody was required to sign the registrar's book (*Anglo-Danubian etc. Co., Ltd.* v. *Rogerson* (1864), 10 Jur. (N. S.) 87; and see *Pacific Steam Navigation Co.* v. *Gibbs* (1865), 14 W. R. 218, where the necessary signature was allowed to be sent); but this practice has been very much broken into of late years (*East Molesey Local Board* v. *Lambeth Waterworks Co., supra*, at p. 300).

(*b*) *Rosling and Flynn, Ltd.* v. *Law Guarantee and Trust Co.* (1903), 47 Sol. Jo. 255. In *Westminster Association, Ltd.* v. *Upward* (1880), 24 Sol. Jo. 690, counsel for the plaintiff offered to give the undertaking on behalf of the liquidator.

(*c*) *Walter* v. *Brown* (1885), 29 Sol. Jo. 435. If given by the parties' solicitors it is not binding (*ibid.*).

(*d*) See 1 Seton, Judgments and Orders, 6th ed., p. 518.

SECT. 5. Undertaking as to Damages.

is usually signed either by the plaintiff or his solicitor in the registrar's minute book (*e*). Where the undertaking is given by a person not a party to the action, he will be required to sign the registrar's minute book (*f*).

When application for inquiry as to damages.

609. The time at which the application for an inquiry as to damages is made is material (*g*); it may be made when the injunction is dissolved or at the trial, but, if made when the injunction is dissolved, it will probably be ordered to stand over till the trial (*h*). It may be made after the trial; but, in this case, it should be made speedily, as, if it is not made within a reasonable time, it may be refused (*i*).

What damages will be awarded.

The damages must be confined to loss which is the natural consequence of the injunction in the circumstances of which the party obtaining the injunction has notice when he makes his application (*k*).

Court not bound to order inquiry as to damages in all cases.

610. The court is not bound to order an inquiry as to damages in all cases, but must be satisfied that the injunction was improperly obtained, and that in all the circumstances of the case damages ought to be given. For example, an interlocutory injunction may be dissolved for delay or some cause which disentitles the plaintiff to an interlocutory injunction, though not to relief at the trial. So, also, regard must be had to the amount of the damage, and if it is trifling or remote, the court will not be justified in granting an inquiry. Nor will it be ordered where the court can satisfy itself as to the amount of the damage without it (*l*). Where an action is dismissed, but without costs, because the court thinks that it was rightly instituted, no inquiry will be ordered (*m*).

In what Division application made.

The application to enforce an undertaking as to damages should be made in the Division in which the undertaking was given (*n*).

(*e*) See 1 Seton, Judgments and Orders, 6th ed., p. 522.

(*f*) *Gurney* v. *Behrend* (1853), 9 Hare, Appendix, lxxxix.

(*g*) *Smith* v. *Day* (1882), 21 Ch. D. 421, C. A.; see *Hunt* v. *Hunt* (1885), 54 L. J. (CH.) 289.

(*h*) *Smith* v. *Day, supra;* see *Southworth* v. *Taylor* (1860), 28 Beav. 616. Where an action is dismissed at the hearing it may be dismissed without prejudice to any application by the defendant in respect of damages. The defendant will then be required to show a *primâ facie* case sufficient to justify an inquiry (*Butt* v. *Imperial Gas Light and Coke Co.* (1866), 14 L. T. 349).

(*i*) *Newby* v. *Harrison* (1861), 3 De G. F. & J. 287, C. A.; *Smith* v. *Day, supra; Re Wood, Ex parte Hall* (1883), 23 Ch. D. 644, C. A.; *Re Hailstone, Hopkinson* v. *Carter* (1910), 102 L. T. 877.

(*k*) *Smith* v. *Day, supra, per* COTTON, L.J., at p. 430.

(*l*) *Graham* v. *Campbell* (1878), 7 Ch. D. 490, 494, C. A. As to the measure of damages, see *Mansell* v. *British Linen Company Bank*, [1892] 3 Ch. 159; *Schlesinger* v. *Bedford*, [1893] W. N. 57, C. A.

(*m*) *Bingley* v. *Marshall* (1863), 9 L. T. 144; but see *Novello* v. *James* (1854), 24 L. J. (CH.) 111, C. A. (where the defendant was held entitled to an inquiry on the dismissal of the action, although, at the time the plaintiff commenced his action, the law was conflicting and the balance of authority in his favour).

(*n*) *Re Hailstone, Hopkinson* v. *Carter, supra.*

SECT. 6.—*Costs.*

SECT. 6. **Costs.**

611. The court has full jurisdiction to deal with the costs (*o*) of an application for an injunction as it thinks fit on the hearing of the application (*p*). As a general rule the court will direct that such costs be costs in the cause (*q*), though if the application is improperly made, it will be dismissed with costs (*r*).

In general.

In the Chancery Division, no direction is given by the court concerning the costs of a motion. The following general rules have been laid down (*s*) :—(1) The party making a successful motion is entitled to his costs as costs in the cause, but the party opposing is not entitled to his costs as costs in the cause (*a*) ; (2) the party making a motion which fails is not entitled to his costs as costs in the cause, but the party opposing it is entitled to his costs as costs in the cause ; and (3) where a motion is made by one party and not opposed by the other party, the costs of both parties are costs in the cause (*b*).

General rules in Chancery Division.

There are, however, several exceptions to these rules. For example, if a defendant unsuccessfully opposes a motion for an injunction, but at the hearing the action is dismissed with costs, the defendant's costs of opposing the motion will be costs in the cause (*c*). So, also, if a motion is ordered to stand over until the trial, and the action is subsequently dismissed with costs, the defendant's costs of the motion will be costs in the cause (*d*). A party who succeeds in his action, but is ordered to pay the costs of the suit up to a given time, will have to bear the costs of motions before that time (*e*).

Exceptions.

Where the court orders a motion to stand over till the hearing, it simply reserves to itself the power of dealing with the costs of the motion in a manner different from that in which it may deal with the costs of the cause (*f*) ; but if the costs of such motions are not then mentioned to the judge, they are treated as costs in the action,

Effect of ordering a motion to stand over reserving costs.

(*o*) See as to the discretion of the court, and generally on the subject of costs, title PRACTICE AND PROCEDURE.

(*p*) *Pearce* v. *Wycombe Rail. Co.* (1853), 17 Jur. 660.

(*q*) *Maitland* v. *Backhouse* (1848), 17 L. J. (CH.) 121, 127 ; see *Coles* v. *Sims* (1854), 5 De G. M. & G. 1, 11, C. A. ; *Powell* v. *Cockerell* (1846), 4 Hare, 557, 572.

(*r*) *Marsack* v. *Reeves* (1821), Madd. & G. 108.

(*s*) *Per* LEACH, V.-C. (1823), 1 Sim. & St. at p. 357.

(*a*) Where a motion for an injunction is ordered to stand over to the hearing, but no order is made as to costs, and at the hearing the plaintiff obtains a perpetual injunction, the motion is substantially a successful one, and the costs of the motion will be costs in the cause (*Mounsey* v. *Lonsdale* (*Earl*), *A.-G.* v. *Lonsdale* (*Earl*) (1870), 6 Ch. App. 141).

(*b*) See also *Great Western Rail. Co.* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1852), 5 De G. & Sm. 437, 450 ; *Hind* v. *Whitmore* (1856), 2 K. & J. 458, 463.

(*c*) *Stevens* v. *Keating* (1850), 1 Mac. & G. 659.

(*d*) *Betts* v. *Clifford* (1860), 1 John. & H. 74 ; *Corcoran* v. *Witt* (1871), L. R. 13 Eq. 53.

(*e*) *Webster* v. *Manby* (1869), 4 Ch. App. 372.

(*f*) *Singer* v. *Audsley* (1872), L. R. 13 Eq. 401, 405.

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and need not be mentioned in the judgment (*g*). Where the costs are reserved, especially if it is suspected that the action will not come to a hearing, application should be made that they may be reserved, not simply to the hearing, but till the hearing or further order; because otherwise, if the cause does not come on for trial, the costs of the motion cannot be obtained (*h*). Even if the action does come to a hearing, and at the hearing no mention is made of the costs of the motion, but the costs of the action are reserved until the hearing on further consideration, that reservation will not include the costs of the motion (*i*). Where the costs of a motion have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation, without the special leave of the judge (*k*).

Sometimes no costs given.

612. If on an application for an *ex parte* injunction material facts have been concealed from the court, the plaintiff will have to bear the costs of the *ex parte* application, even though the court declines to discharge the order (*l*). The costs generally of an action for an injunction are in the discretion of the court. But, as a general rule, if both parties are at fault (*m*), or if the plaintiff claims more than he is entitled to and the defendant offers less than he should have offered (*n*), no costs may be given on either side. So, also, if the plaintiff fails as to part and succeeds as to part of his claim, the court will either give no costs on either side (*o*), or will direct the costs of the part as to which the plaintiff has failed to be taxed and set off against those of the part as to which he has succeeded, and the balance of the costs only to be paid to the party entitled to the larger amount of costs (*p*). In a case of great hardship an injunction may be granted without costs (*q*). Where an injunction is refused, but the defendant has been to blame in the matter, the plaintiff may not be ordered to pay the defendant's costs (*r*).

(*g*) See *Mounsey* v. *Lonsdale* (*Earl*), *A.-G.* v. *Lonsdale* (*Earl*) (1870), 6 Ch. App. 141; *British Natural Premium Provident Association* v. *Bywater*, [1897] 2 Ch. 531; and p. 287, *ante*.

(*h*) *Rumbold* v. *Forteath* (1858), 4 Jur. (N. S.) 608; see *Jones* v. *Batten* (1853), 10 Hare, Appendix, xi.

(*i*) *Gardner* v. *Marshall* (1845), 14 Sim. 575.

(*k*) *British Natural Premium Provident Association* v. *Bywater*, *supra*.

(*l*) *Holden* v. *Waterlow* (1866), 15 W. R. 139.

(*m*) *Hilliard* v. *Hanson* (1882), 21 Ch. D. 69, C. A.; *Aylwin* v. *Evans* (1882), 47 L. T. 568.

(*n*) *Moet* v. *Couston* (1864), 33 Beav. 578; *Wood* v. *Saunders* (1875), 10 Ch. App. 582, 586.

(*o*) *Russell* v. *Watts* (1883), 25 Ch. D. 559, 577, C. A., reversed (1885), 10 App. Cas. 590; *Moore* v. *Bennett* (1884), 1 R. P. C. 129, H. L.; *Sutton* v. *English and Colonial Produce Co.*, [1902] 2 Ch. 502, 507; see *Rochdale Canal Co.* v. *King* (1853), 16 Beav. 630.

(*p*) *Bourke* v. *Alexandra Hotel Co., Ltd.* (1877), 25 W. R. 782; *Knight* v. *Purssell* (1879), 49 L. J. (CH.) 120; *Nordenfelt* v. *Gardner and Gardner Gun Co.* (1884), 1 R. P. C. 61, 76, C. A.; *Sellors* v. *Matlock Bath Local Board* (1885), 14 Q. B. D. 928, 935; *Jenkins* v. *Jackson*, [1891] 1 Ch. 89, C. A.; R. S. C., Ord. 65, r. 27 (21).

(*q*) *Broder* v. *Saillard* (1876), 2 Ch. D. 692.

(*r*) *Harrison* v. *Good* (1871), L. R. 11 Eq. 338; *Rodgers* v. *Rodgers* (1874), 22 W. R. 887, 889; *Wylam* v. *Clarke*, [1876] W. N. 68; *Borthwick* v. *The*

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Extra costs.

613. Where an injunction is granted, but the cost of the litigation has been increased through the plaintiff pleading allegations which are without foundation, the defendant will be entitled to the extra costs thereby occasioned to him (*s*). A wrongdoer cannot, however, be heard to complain if, in proceedings hurriedly taken to stop a wrong, the plaintiff does not accurately state his title, and in such case the defendant will not be relieved from payment of the extra costs occasioned by the plaintiff's mistake as to his title (*t*).

Plaintiff not bound to apply to defendant before action.

A plaintiff is not bound to apply to a person, who is infringing his legal right, to know whether or not he will accede to his demands before commencing an action for an injunction (*a*); but the court will not as a matter of course order the defendant to pay the costs, when no previous application has been made to him (*b*).

Offer by defendant.

614. If before action brought (*c*) or after the issue of the writ (*d*) the plaintiff is offered by the defendant all the relief that he seeks, and the offer is one which, in the opinion of the court, ought to have been accepted, but the plaintiff nevertheless proceeds with his action, the court, although it may grant the injunction, may order the plaintiff to pay the costs incurred subsequently to the offer (*e*).

The offer must include the plaintiff's costs up to the time when it is made (*f*). If the defendant does not offer to submit to the injunction and to pay the costs (*g*), or if, although submitting to

Evening Post (1888), 37 Ch. D. 449, 460, C. A.; see *Bass* v. *Dawber* (1869), 19 L. T. 626.

(*s*) *Pierce* v. *Franks* (1846), 15 L. J. (CH.) 122, 123; see *Rose* v. *Loftus* (1878), 47 L. J. (CH.) 576, 579.

(*t*) *A.-G.* v. *Tomline* (1877), 5 Ch. D. 750.

(*a*) *Burgess* v. *Hills* (1858), 26 Beav. 244; *Burgess* v. *Hately* (1858), 26 Beav. 249; *Upmann* v. *Elkan* (1871), L. R. 12 Eq. 140; *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501; *Upmann* v. *Forester* (1883), 24 Ch. D. 231; *Wittman* v. *Oppenheim* (1884), 27 Ch. D. 260.

(*b*) *American Tobacco Co.* v. *Guest*, [1892] 1 Ch. D. 630; *Walter* v. *Steinkopff*, [1892] 3 Ch. 489; see *Upmann* v. *Elkan*, *supra*; and Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5; R. S. C., Ord. 65, r. 1. The *dictum* of JESSEL, M.R., in *Cooper* v. *Whittingham*, *supra*, at p. 502 (see also *Upmann* v. *Forester*, *supra*), to the effect that "where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the court to deprive him of his costs, the court has no discretion and cannot take away the plaintiff's right to costs," was disapproved in *American Tobacco Co.* v. *Guest*, *supra*, and *Walter* v. *Steinkopff*, *supra*.

(*c*) *Nunn* v. *D'Albuquerque* (1865), 34 Beav. 595; *Snuggs* v. *Seyd and Kelly's Credit Index Co.*, [1894] W. N. 95.

(*d*) *Millington* v. *Fox* (1838), 3 My. & Cr. 338; *Colburn* v. *Simms* (1843), 2 Hare, 543, 561; *Sonnenschein* v. *Barnard* (1887), 57 L. T. 712; *Walter* v. *Steinkopff*, *supra*.

(*e*) *Jenkins* v. *Hope*, [1896] 1 Ch. 278; see *Chappell* v. *Davidson* (1855), 2 K. & J. 123, 129; *McAndrew* v. *Bassett* (1864), 4 De G. J. & Sm. 380.

(*f*) *Fradella* v. *Weller* (1831), 2 Russ. & M. 247; *Geary* v. *Norton* (1846), 1 De G. & Sm. 9; *Burgess* v. *Hills* (1858), 26 Beav. 244; *Moet* v. *Couston* (1864), 33 Beav. 578; *Nunn* v. *D'Albuquerque*, *supra*; *Jenkins* v. *Hope*, *supra*; however trivial the subject-matter may be (*Fradella* v. *Weller*, *supra*; but see *Walter* v. *Steinkopff*, *supra*).

(*g*) *Geary* v. *Norton*, *supra*; *Chappell* v. *Davidson* *supra*; *Upmann* v. *Forester*, *supra*; *Wittman* v. *Oppenheim*, *supra*; but see *Walter* v. *Steinkopff*, *supra*.

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it, he refuses to pay the costs (*h*), or if any question is left open between the parties (*i*), the plaintiff will not be deprived of his costs of bringing the action to a hearing.

Where matter disposed of on motion.

615. If the plaintiff obtains all the relief which he seeks on an interlocutory motion in the action, he should apply to the defendant to have the costs disposed of on motion (*k*). The case cannot, however, be so dealt with if the defendant refuses to allow the matter to be disposed of on motion, or if there is any question remaining open between the parties to be decided (*l*).

Abandoned motion.

616. Where notice of motion has been given, and the party giving it does not appear, he will have to pay the respondent's costs (*m*). The costs of an abandoned motion must be applied for on the next motion day after that for which notice of motion was given; otherwise they will be refused (*n*).

Where a motion for an injunction has been dismissed with costs, a second motion for the same object cannot be made until the costs of the first have been paid or secured by a payment into court (*o*).

Appeal.

If, on appeal, the court is of opinion that there was no foundation for the application, it will, in reversing the order made by the court below, direct the applicant to pay the costs incurred in the original motion (*p*).

Costs of a motion may be given, though not asked for by the notice of motion (*q*), but not where the respondent does not appear (*r*).

Costs of *interim* injunction.

An order, made on notice, continuing an injunction with costs will, in the absence of special directions to the contrary, include the costs of an *interim* injunction previously obtained *ex parte* (*s*).

(*h*) *Fradella* v. *Weller* (1831), 2 Russ. & M. 247; *Burgess* v. *Hills* (1858), 26 Beav. 244; *Jamieson* v. *Teague* (1857), 3 Jur. (N. S.) 1206; *Mayhew* v. *Maxwell* (1861), 3 L. T. 847; see *Moet* v. *Couston* (1864), 33 Beav. 578 (where, however, both parties being in the wrong, no costs were given on either side).

(*i*) *Sonnenschein* v. *Barnard* (1887), 57 L. T. 712.

(*k*) *Morgan* v. *Great Eastern Rail. Co.* (1863), 1 Hem. & M. 78; *Sonnenschein* v. *Barnard*, *supra*.

(*l*) *Ibid.*; *Wilde* v. *Wilde* (1862), 4 De G. F. & J. 348, C. A.

(*m*) *Berry* v. *Exchange Trading Co.* (1875), 1 Q. B. D. 77.

(*n*) *Woodcock* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1853), 17 Jur. 33; see *Eccles* v. *Liverpool Borough Bank* (1859), John. 402; *Yetts* v. *Biles* (1877), 25 W. R. 452. In *Wedderburne* v. *Llewellyn* (1865), 13 W. R. 939, a motion for which notice had been given for a named day was ordered on that day to stand over till the next motion day, but was not then brought on or saved, and it was held that the moving party was entitled to move up to the close of the following motion day. Counsel intending to ask for the costs of a motion, as abandoned, should communicate his intention to counsel instructed to move; see *Aitken* v. *Dunbar* (1877), 25 W. R. 366.

(*o*) *Burdell* v. *Hay* (1863), 33 Beav. 189; see *Oldfield* v. *Cobbett* (1849), 12 Beav. 91; *Martin* v. *Beauchamp* (*Earl*) (1883), 25 Ch. D. 12, C. A.; *M'Cabe* v. *Bank of Ireland* (1889), 14 App. Cas. 413; R. S. C., Ord. 26, r. 4, and the Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51).

(*p*) *Beardmer* v. *London and North-western Rail. Co.* (1849), 13 Jur. 327.

(*q*) *Powell* v. *Cockerell* (1846), 4 Hare, 557, 572; *Clark* v. *Jaques* (1849), 11 Beav. 623; *Pearce* v. *Wycombe Rail. Co.* (1853), 17 Jur. 660.

(*r*) *Pratt* v. *Walker* (1854), 19 Beav. 261.

(*s*) *Blakey* v. *Hall* (1887), 56 L. J. (CH.) 568.

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If there are special grounds, costs may be ordered to be taxed on the higher scale (*a*).

Taxation on higher scale.

In any action against a public authority (*b*), judgment for the defendant carries with it the right to costs as between solicitor and client (*c*); but this provision does not take away the discretion of the judge to deprive the successful defendant of costs for good cause (*d*).

Part VI.—Remedies for Breach of Injunction.

SECT. 1.—*Nature of Remedies.*

Committal.

617. The appropriate remedy for a breach of an injunction is by committal (*e*), but it is usual to ask in the notice of motion for committal and, in the alternative, for leave to issue a writ of attachment (*f*).

(*a*) R. S. C., Ord. 65, r. 9; see *Holland* v. *Worley*, [1884] W. N. 90; *Turton* v. *Turton* (1889), 42 Ch. D. 128, C. A. (where costs on the higher scale were given); *Hudson* v. *Osgerby* (1884), 32 W. R. 566; *American Braided Wire Co.* v. *Thomson* (1890), 44 Ch. D. 274, 296, C. A. (where they were refused). Costs have been given on the High Court scale where only £10 damages were recovered, the claim for an injunction having been satisfied (*Doherty* v. *Thompson* (1906), 94 L. T. 626, C. A.). As to costs on the higher scale, see generally title PRACTICE AND PROCEDURE.

(*b*) Under the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1. See also title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*c*) *Harrop* v. *Ossett Corporation*, [1898] 1 Ch. 525; *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1, C. A.; affirmed, *sub nom. Fielden* v. *Morley Corporation*, [1900] A. C. 133; *Smith* v. *Northleach Rural Council*, [1902] 1 Ch. 197; see *Ambler (Jeremiah) & Sons, Ltd.* v. *Bradford Corporation*, [1902] 2 Ch. 585, C. A.

(*d*) R. S. C., Ord. 65, r. 1; *North Metropolitan Tramways Co.* v. *London County Council*, [1898] 2 Ch. 145, 147; *Bostock* v. *Ramsey Urban Council*, [1900] 2 Q. B. 616, C. A.

(*e*) *Mander* v. *Falcke*, [1891] 3 Ch. 488; see R. S. C., Ord. 42, r. 7.

(*f*) See, generally, title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 306 *et seq.*, 315, 322; *Avory* v. *Andrews* (1882), 30 W. R. 564; *Robinson* v. *Elton* (1835), 4 L. J. (CH.) 197; *Pettitt* v. *Bell* (1908), 52 Sol. Jo. 784; *Powel* v. *Follet* (1747), 1 Dick. 116; *Kimpton* v. *Eve* (1813), 2 Ves. & B. 349; *Carrow* v. *Ferrior* (1867), 37 L. J. (CH.) 569; *Gooesman* v. *Dann* (1840), 10 Sim. 517; *Scott* v. *Becher* (1817), 4 Price, 346; *Re Bryant* (1876), 4 Ch. D. 98. For the difference between committal and attachment, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 308, 310; and see *ibid.*, pp. 308 *et seq.*; Daniell, Chancery Forms, 5th ed., p. 440; Oswald on Contempt, 3rd ed., p. 27, and Appendix II., Form 4, as to the practice of asking for committal and attachment in the alternative. Writs of attachment cannot be issued except with the leave of the court, which is applied for on notice to the party against whom the attachment is to be issued (see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 309; R. S. C., Ord. 42, r. 7). As to form of order for committal, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 315; *Stephens* v. *Workman* (1863), 11 W. R. 503). As to privilege, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 320. If a member of Parliament is guilty of contempt which is in its nature, or by its incidents, criminal, he may be committed or attached, and is not protected by privilege of Parliament (*Wellesley* v. *Beaufort (Duke)*, *Long Wellesley's Case* (1831), 2 Russ. & M. 639, 666; *Re Gent, Gent-Davis* v. *Harris* (1888), 40 Ch. D. 190; *Re Armstrong, Ex parte Lindsay*, [1892] 1 Q. B. 327). As to the enforcement of undertakings given to the court, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 305, 306.

SECT. 1. Nature of Remedies.

Sequestration.

618. Where the party committing a breach of an injunction is a limited company (*g*), or other corporation (*h*), or is out of the jurisdiction (*i*), the proper course is to move that a writ of sequestration (*k*) do issue against the property of such party. The remedy by writ of sequestration against the property of any person, other than a corporation, is dealt with elsewhere (*l*).

Order for act to be done at party's expense.

619. If a mandatory order or injunction is not complied with, the court, besides, or instead of, proceeding against the disobedient party for contempt, may direct that the act required to be done shall be done as far as practicable by the party by whom the mandatory order or injunction has been obtained, or some other person appointed by the court, at the cost of the disobedient party; and, upon the act being done, the expenses incurred may be ascertained in such manner as the court may direct, and execution may issue for the amount so ascertained and costs (*m*).

SECT. 2.—*When Remedies Available.*

Date from which injunction operates.

620. An injunction operates from the time it is pronounced and not only from the date when the order is drawn up and completed, and consequently the party against whom it is made will be guilty of contempt if he commits a breach of the injunction after he has received notice of it (*n*), although the order has not been drawn up (*o*).

Injunction must be obeyed.

621. An order for an injunction must be implicitly observed and every diligence exercised to observe it to the letter (*p*); and anyone who

(*g*) *Re Hooley, Ex parte Hooley* (1899), 79 L. T. 706.

(*h*) *A.-G.* v. *Great Northern Rail. Co.* (1850), 4 De G. & Sm. 75; *Spokes* v. *Banbury Board of Health* (1865), L. R. 1 Eq. 42; *Selous* v. *Croydon Local Board*, [1885] W. N. 105; and see R. S. C., Ord., 42, r. 31. In addition to the remedy of sequestration against the corporate property of a corporation, any judgment or order against a corporation wilfully disobeyed may be enforced by attachment against the directors or other officers thereof, or by writ of sequestration against their property (R. S. C., Ord. 42, r. 31; titles CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 303, 313; CORPORATIONS, Vol. VIII., p. 396; EXECUTION, Vol. XIV., p. 81; and *Davis* v. *Rhayader Granite Quarries, Ltd.* (1911), 131 L. T. Jo. 79), but an attachment will not be ordered to issue against a director unless and until he has been personally served with the order which has been disobeyed (*McKeown* v. *Joint Stock Institute, Ltd.*, [1899] 1 Ch. 671). In a proper case the court will order the motion to stand over to enable this to be done (*ibid.*).

(*i*) *East of England Bank, Re Hall* (1864), 2 Drew. & Sm. 284; and see *Storer* v. *Great Western Rail. Co.* (1841), 1 Y. & C. Ch. Cas. 180.

(*k*) See R. S. C., Ord. 43, r. 6. As to the effect and operation of a writ of sequestration, see title EXECUTION, Vol. XIV., pp. 79 *et seq.* See also *ibid.*, pp. 8, 81; R. S. C., Ord. 42, r. 31; Ord. 43, r. 67; 1 Seton, Judgments and Orders, 6th ed., p. 745. An undertaking is equivalent to an order for the purposes of R. S. C., Ord. 42, r. 31, and can be enforced against a corporation by sequestration (*Milburn* v. *Newton Colliery, Ltd.*, (1908), 52 Sol. Jo. 317).

(*l*) See title EXECUTION, Vol. XIV., pp. 79 *et seq.*

(*m*) R. S. C., Ord. 42, r. 30. An undertaking does not come within the language of this rule (*Mortimer* v. *Wilson* (1885), 33 W R. 927). As to execution, generally, see title EXECUTION, Vol XIV., pp. 1 *et seq.*

(*n*) As to what is a sufficient notice, see p. 296, *post*.

(*o*) *Rattray* v. *Bishop* (1818), 3 Madd. 220; *M'Neil* v. *Garratt* (1841), Cr. & Ph. 98; *Gooch* v. *Marshall* (1860), 8 W. R. 410.

(*p*) *Harding* v. *Tingey* (1864), 12 W. R. 684; *Spokes* v. *Banbury Board of Health* (1865), L. R. 1 Eq. 42.

does not obey it to the letter is guilty of committing a wilful breach of it unless there is some misapprehension (*q*). But, in determining whether or not a breach has been committed, regard is paid to the circumstances in which, and the object for which, the injunction was granted (*r*). Some trifling thing done in the ordinary course of business which does not do any real mischief will not necessarily be treated as a breach, and, if a man attempts to use an injunction for the purpose of oppression by moving in respect of such an act, he may have to pay the costs of so doing (*a*). Where an injunction in general terms is not restricted by reference to a particular act, another act causing a similar injury will be regarded as a breach (*b*).

Breach must be strictly proved.

An application to commit for a violation of an order for an injunction is a matter *strictissimi juris* (*c*), and the act of the defendant will not be treated as contumacious unless it is clearly proved that the injury complained of has been caused by his act (*d*).

Effect of irregular order.

622. The order cannot be disregarded so long as it stands, even though it has been irregularly or erroneously obtained (*e*), and it must be obeyed until it is discharged (*f*); but, in punishing for contempt, the court will take into consideration all the facts of the case and the circumstances in which the order was obtained (*g*). The court may decline to assist a plaintiff whose right has been protected by an injunction if he has not himself exercised due diligence in maintaining such right (*h*).

Undertaking equivalent to an injunction.

623. An undertaking entered into or given to the court is equivalent to an injunction, so far as an application to the court to punish its breach is concerned (*i*); but the court will not enforce an undertaking by committal, if it has been given by mistake in a more extensive form than the defendant intended (*k*).

Effect of misrepresentation by plaintiff.

624. Where a plaintiff who has obtained an injunction misrepresents to the public what has been done by the court, and the defendant applies himself to correct that misrepresentation and thereby commits a technical breach of the injunction, the court will

(*q*) *Spokes* v. *Banbury Board of Health* (1865), L. R. 1 Eq. 42.
(*r*) *Loder* v. *Arnold* (1850), 15 Jur. 117.
(*a*) *Baxter* v. *Bower* (1875), 44 L. J. (CH.) 625, 628, C. A.
(*b*) *A.-G.* v. *Great Northern Rail. Co.* (1850), 4 De G. & Sm. 75.
(*c*) *Harding* v. *Tingey* (1864), 12 W. R. 684; see *Taylor* v. *Roe* (1893), 68 L. T. 213.
(*d*) *Dawson* v. *Paver* (1847), 5 Hare, 415, 424.
(*e*) *Woodward* v. *Lincoln (Earl)* (1674), 3 Swan. 626; *Partington* v. *Booth* (1817), 3 Mer. 148; *Fennings* v. *Humphery* (1841), 4 Beav. 1; *Chuck* v. *Cremer* (1846), 2 Ph. 113; *Russell* v. *East Anglian Rail. Co.* (1850), 3 Mac. & G. 104, 117.
(*f*) *Fennings* v. *Humphery*, *supra*; *Russell* v. *East Anglian Rail. Co.*, *supra*.
(*g*) *Partington* v. *Booth*, *supra*; *Russell* v. *East Anglian Rail. Co.*, *supra*.
(*h*) *Rodgers* v. *Nowill* (1853), 1 W. R. 122.
(*i*) *Neath Canal Co.* v. *Ynisarwed Resolven Colliery Co.* (1875), 10 Ch. App. 450; *A.-G.* v. *Boyle* (1864), 10 Jur. (N. S.) 309; and see *London and Birmingham Rail. Co.* v. *Grand Junction Canal Co.* (1835), 1 Ry. & Can. Cas. 224, *per* PEPYS, M.R., at p. 241; *Thomson* v. *Hughes* (1890), 7 R. P. C. 71, 76; *Howard* v. *Press Printers, Ltd.* (1904), 74 L. J. (CH.) 100, C. A.; *Milburn* v. *Newton Colliery, Ltd.* (1908), 52 Sol. Jo. 317.
(*k*) *Mullins* v. *Howell* (1879), 11 Ch. D. 763.

SECT. 2. When Remedies. Available.

refuse to listen to any complaint on the subject from the plaintiff, because he himself has been to blame in the matter (*l*).

Mere intention to commit not sufficient.

625. The mere intention to commit a breach of an injunction, which is not carried out so as actually to contravene the words of the order, does not constitute a breach of the injunction (*m*); but a party against whom, together with others, an injunction has been granted, who is present, aiding and abetting where a breach is committed, is considered as actually guilty of it himself (*n*).

Breach by servants or agents.

626. A party who is not personally to blame will not be committed for contempt for a breach of an injunction committed by his servants (*o*) or agents (*p*), but he may be ordered to pay the costs of the motion to commit (*q*).

Husband and wife.

Where an injunction is granted against a man and his wife, and a breach is committed by the wife, but the husband is not implicated or to blame in the matter, he will not be committed for contempt (*r*).

Breach by stranger.

A person who has not been restrained by an injunction which has been granted cannot be committed for breach thereof (*s*), but he may be committed for contempt if, with knowledge of the injunction, he intermeddles and acts in contravention thereof (*t*).

SECT. 3.—*Practice.*

627. In the Chancery Division the application to commit is made on motion to the court (*u*).

(*l*) *Barfield* v. *Nicholson* (1824), 2 L. J. (o. s.) (CH.) 90.

(*m*) *Grand Junction Canal Co.* v. *Dimes* (1849), 18 L. J. (CH.) 419; but where the party against whom the injunction has been granted commits acts which are inconsistent with and contrary to the tenor of the decree an injunction will be granted to restrain such acts (*ibid.*), and similarly the court will interfere to restrain the defendant from committing an act which is against the spirit, though not within the letter, of the injunction (*Brenan* v. *Preston* (1853), 1 W. R. 172, C. A.).

(*n*) *St. John's College, Oxford* v. *Carter* (1839), 4 My. & Cr. 497.

(*o*) *Rantzen* v. *Rothschild* (1865), 13 L. T. 399.

(*p*) *Re Bishop, Ex parte Langley, Ex parte Smith* (1879), 13 Ch. D. 110, C. A. Where a company against whom, its servants and agents, an injunction has been obtained goes into voluntary liquidation, and a new company is formed under the same name *bonâ fide* for the purpose of obtaining new capital and not colourably for the purpose of evading the order, the new company is an independent company, and is in no sense the servant or agent of the old one (*Bosch* v. *Simms Manufacturing Co., Ltd.* (1909), 25 T. L. R. 419); compare *A.-G.* v. *Birmingham Corporation* (1880), 15 Ch. D. 423, C. A.; *A.-G.* v. *Birmingham, Tame, and Rea Drainage Board* (1881), 17 Ch. D. 685, C. A. See also title COMPANIES, Vol. V., pp. 326, 591.

(*q*) *Rantzen* v. *Rothschild, supra.*

(*r*) *Hope* v. *Carnegie* (1.) (1868), L. R. 7 Eq. 254.

(*s*) *Iveson* v. *Harris* (1802), 7 Ves. 251; *Wellesley* (*Lord*) v. *Mornington* (*Ear.*) (1848), 11 Beav. 180.

(*t*) *Wellesley* (*Lord*) v. *Mornington* (*Earl*), *supra*; *Smith-Barry* v. *Dawson* (1891), 27 L. R. Ir. 558; *Seaward* v. *Paterson*, [1897] 1 Ch. 545, C. A. The exercise of an antecedent right by a person not a party is no breach of an injunction (*Bootle* v. *Stanley* (undated), 2 Eq. Cas. Abr. 528; and see *Avory* v. *Andrew* (1882), 30 W. R. 564, and title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 292).

(*u*) See as to this and the practice generally, title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 309 *et seq.*

Service of motion to commit.

In the King's Bench Division, when the contempt is in respect of a judge's or master's order, the application is by summons in chambers, and in other cases the application is by motion to a Divisional Court (*w*).

Notice of the application must be served personally upon the contemnor (*a*); but, where the court is satisfied that every endeavour to effect personal service has been made and failed, it can and ought to order substituted service (*b*). The appearance of the respondent upon an application to commit does not constitute a waiver of any objection on the ground of irregularity, because the liberty of the subject is concerned (*c*).

Irregularities.

628. Although the court can for the purpose of justice condone an irregularity in proceedings to commit where good reasons are given (*d*), it will not condone a direct non-compliance with the rules, and a respondent can take advantage of such objections even though he has answered the affidavits and appears by counsel (*e*). Objections may, however, be got over by conduct amounting to waiver (*f*). It is no objection to a motion to commit that the plaintiff has moved to commit one only of the defendants (*g*).

Court takes a lenient view, and is usually content with making contemnor pay costs.

The court takes a lenient view in favour of the liberty of the subject, and is usually satisfied by the payment of the costs of the application to commit unless the conduct of the contemnor is very contemptuous and a flagrant disrespect to the court (*h*); and where

(*w*) See title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 310.

(*a*) *Ibid.*, p. 315; *Angerstein* v. *Hunt* (1801), 6 Ves. 488; *Hope* v. *Carnegie* (1.) (1868), L. R. 7 Eq. 254; *D.* v. *A. & Co.*, [1900] 1 Ch. 484. Personal service cannot be dispensed with, even though counsel undertakes to appear for the party (*Ellerton* v. *Thirsk* (1820), 1 Jac. & W. 376). The notice need not be served on the defendant's clerk in court as well as on the defendant (*Bowdler* v. *Bowdler* (1840), 9 L. J. (CH.) 394). As to the form of the notice of motion, see 1 Seton, Judgments and Orders, 6th ed., p. 643; *Angerstein* v. *Hunt*, *supra*; *Durant* v. *Moore* (1830), 2 Russ. & M. 33; *Wellesley* (*Lord*) v. *Mornington* (*Earl*) (1848), 11 Beav. 180; *Seaward* v. *Paterson*, [1897] 1 Ch. 545, 550, C. A.; and title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 309. As to evidence and procedure, see *ibid.*, pp. 310 *et seq.*; *Morris* v. *Morris* (1825), 1 Hog. 238; *Hudson* v. *Walker* (1894), 64 L. J. (CH.) 204, following *Selous* v. *Croydon Rural Sanitary Authority* (1885), 53 L. T. 209; *Stockton Football Co.* v. *Gaston*, [1895] 1 Q. B. 453.

(*b*) *Mander* v. *Falcke* (1891), 65 L. T. 454; and see R. S. C., Ord. 67, r. 6, as to the method of effecting substituted service.

(*c*) *Mander* v. *Falcke*, [1891] 3 Ch. 488, C. A.

(*d*) See R. S. C., Ord. 70, r. 1; *Petty* v. *Daniel* (1886), 34 Ch. D. 172.

(*e*) *Taylor* v. *Roe* (1893), 68 L. T. 213. Where the affidavit in support of a motion for attachment was not served with the notice of motion, but was served two clear days before the day named for moving the court, CHITTY, J., held that this was not such an irregularity as to make the notice invalid (*Hampden* v. *Wallis* (1884), 26 Ch. D. 746, 749, C. A.).

(*f*) *Rendell* v. *Grundy*, [1895] 1 Q. B. 16, C. A.

(*g*) *Newman* v. *Ring* (1846), 10 Jur. 463; but see *Daugars* v. *Rivaz* (1866), 15 L. T. 196, C. A., in which case, however, the plaintiff had himself acted in contravention of the injunction, and there were other special circumstances.

(*h*) *Leonard* v. *Attwell* (1810), 17 Ves. 385; *Littler* v. *Thomson* (1839), 2 Beav. 129; *Newman* v. *Ring*, *supra*; *Rantzen* v. *Rothschild* (1865), 13 L. T. 399; *Price* v. *Hutchison* (1870), L. R. 9 Eq. 534, 536; *Re Bryant* (1876), 4 Ch. D. 98; *Re Bishop*, *Ex parte Langley*, *Ex parte Smith* (1879), 13 Ch. D. 110, C. A.; *Plating Co.* v. *Farquharson* (1881), 17 Ch. D. 49, C. A.; see also

SECT. 3. Practice.

the defendant has endeavoured to set himself right in respect of the original charge against him the court will hesitate to commit (*i*).

When motion refused.

Where a motion to commit is refused it will usually be refused without costs if the party against whom it is sought (*k*), or his solicitor (*l*), has been to blame in the matter. The court does not encourage motions to commit where committal is not really sought, and all that is asked for is an apology and the payment of costs. In such cases the party moving ought not to be allowed his costs (*m*), and the motion may be refused with costs (*n*). So, also, although no act of the parties can amount to a waiver of contempt, yet if the plaintiff has acquiesced for some time the court may decline to commit and give no costs (*o*).

Part VII.—Dissolution of Injunction.

When application may be made.

629. An interlocutory injunction may be dissolved at any time before judgment in the action, and an *interim* order at any time before the day named.

Notice should be given for a motion day.

In the Chancery Division the application to dissolve must be made by motion on notice (*p*). All the parties to the action in which the injunction was obtained should be served with notice (*q*). Apparently a stranger to a suit, who is affected by an injunction, can apply to dissolve it (*r*). The notice of motion should be given for a motion day (*s*), and, where leave has been obtained to give

Lane v. *Sterne* (1862), 3 Giff. 629 ; 1 Seton, Judgments and Orders, 6th ed., p. 745.

(*i*) *Cornish* v. *Upton* (1861), 4 L. T. 862.

(*k*) *Daw* v. *Eley* (1868), L. R. 7 Eq. 49; *Buenos Ayres Gas Co., Ltd.* v. *Wilde* (1880), 29 W. R. 43.

(*l*) *Carrow* v. *Ferrior*, *Dunn* v. *Ferrior* (1868), 17 L. T. 536.

(*m*) *Plating Co.* v. *Farquharson* (1881), 17 Ch. D. 49, 56, C. A.

(*n*) *Metropolitan Music Hall Co., Ltd.* v. *Lake* (1889), 60 L. T. 749; *R.* v. *Payne*, [1896] 1 Q. B. 577, 581; *Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860, 863, 864; *Plating Co.* v. *Farquharson*, *supra*, *per* JAMES, L.J., at p. 57.

(*o*) *Mills* v. *Cobby* (1815), 1 Mer. 3.

(*p*) As to the length of notice, and generally as to motions, see R. S. C., Ord. 52, r. 5, and pp. 275 *et seq.*, *ante*. In *Storer* v. *Jackson* (1842), 12 Sim. 503, the court refused to hear a motion to dissolve an *ex parte* injunction pending a motion for production of documents, of which notice had been given. In *De Beaufort* v. *Archdeacon* (1835), 1 Y. & C. (EX.) 549, where an injunction restraining the transfer of a small sum of stock had been granted, but no further proceedings had been taken in the suit for thirty years, the injunction was dissolved on petition by the only party interested in the stock.

(*q*) *Service* v. *Castaneda* (1845), 9 Jur. 367; *Masterman* v. *Lewin* (1847), 2 Ph. 189. The court will not hear an *ex parte* motion to dissolve an *ex parte* injunction (*Spanish General Agency Corporation* v. *Spanish Corporation, Ltd.*, [1890] W. N. 158).

(*r*) *Jones* v. *Roberts* (1841), 12 Sim. 189; *Bourbaud* v. *Bourbaud* (1864), 12 W. R. 1024.

(*s*) *Steedman* v. *Poole* (1847), 11 Jur. 555 ; but an injunction can be dissolved in the Long Vacation (*Lane* v. *Barton* (1843), 1 Ph. 363).

notice for another day, this fact should be stated in the notice of motion (*a*).

Should be made to court which granted injunction.

An application to dissolve ought to be made to the court by which the injunction was granted (*b*), but where an action has been transferred to another branch of the court after the granting of the injunction, the application may be made to that branch of the court (*c*).

Evidence.

On an application to dissolve, the plaintiff cannot insist that the motion should stand over for the cross-examination of witnesses for the defendant (*d*).

Irregular to grant new injunction on motion to dissolve.

On an application to dissolve, it is irregular for the court to grant a new injunction (*e*).

In the King's Bench Division the application is by summons.

Ground for dissolution.

630. An injunction may be dissolved if the plaintiffs have neglected to make use of powers which they possess (*f*), or if default has been made in giving security for costs (*g*), or if the affidavit had not been filed and an office copy thereof obtained when the injunction was moved for (*h*), or if it was granted on a suppression or misrepresentation of material facts (*i*), even though the injunction is about to expire (*k*).

A plaintiff cannot support the injunction by showing another state of circumstances in which he would be entitled to it (*l*), but if he has obtained an *ex parte* injunction, which is afterwards dissolved on the ground of concealment of facts, he is not precluded from making another application on the merits (*m*). It is no excuse for

(*a*) *Hill* v. *Rimell* (1837), 2 Jur. 45.

(*b*) *Hammond* v. *Smith* (1845), 15 L. J. (CH.) 40; *Pareles* v. *Lizardi* (1846), 9 Beav. 490.

(*c*) *Sturgeon* v. *Hooker* (1847), 1 De G. & Sm. 484. In such a case there is no jurisdiction to question whether the judge, in granting the injunction, rightly or correctly exercised his discretion, having regard to the materials before him (*ibid.*).

(*d*) *Normanville* v. *Stanning* (1853), 10 Hare, Appendix, xx.

(*e*) *Burdett* v. *Hay* (1863), 4 De G. J. & Sm. 41.

(*f*) *Ellison* v. *Bignold* (1821), 2 Jac. & W. 503.

(*g*) *Fort* v. *Bank of England* (1840), 10 Sim. 616.

(*h*) *Jackson* v. *Cassidy* (1841), 10 Sim. 326; *Elsey* v. *Adams* (1863), 4 Giff. 398. This is not in accordance with the practice in the King's Bench Division (see p. 280, *ante*); and in the Chancery Division the court frequently gives leave to file affidavits after the motion is heard. For cases in which the matter is urgent, see *ibid.*

(*i*) *Hatch* v. *Borsley* (1835), 4 L. J. (CH.) 160; *Brown* v. *Newall* (1837), 2 My. & Cr. 558, 570; *Vandergucht* v. *De Blaquiere* (1838), 8 Sim. 315, 323; *Hilton* v. *Granville* (*Lord*) (1841), 4 Beav. 130; *Hemphill* v. *M'Kenna* (1842), 3 Dr. & War. 183; *Dease* v. *Plunkett* (1843), Drury *temp.* Sug. 255; *Castelli* v. *Cook* (1849), 7 Hare, 89, 94; *Dalglish* v. *Jarvie* (1850), 2 Mac. & G. 231, 243; *Harbottle* v. *Pooley* (1869), 20 L. T. 436; *Ross* v. *Buxton*, [1888] W. N. 55; *Boyce* v. *Gill* (1891), 64 L. T. 824; *Schmitten* v. *Faulks*, [1893] W. N. 64. An *ex parte* order may be discharged without formal notice being given by the defendant (*Boyce* v. *Gill*, *supra*).

(*k*) *Wimbledon Local Board* v. *Croydon Rural Sanitary Authority* (1886), 32 Ch. D. 421, C. A., *per* NORTH, J.

(*l*) *A.-G.* v. *Liverpool Corporation* (1835), 1 My. & Cr. 171, 210; *Hilton* v. *Granville* (*Lord*), *supra*; *Castelli* v. *Cook*, *supra*.

(*m*) *Fitch* v. *Rochfort* (1849), 18 L. J. (CH.) 458.

PART VII. Dissolution of Injunction.

a party to say that he was not aware of the importance of the facts which have not been brought to the notice of the court (*n*), or that he had forgotten them (*o*).

The injunction will not, however, be dissolved unless the misrepresentation or suppression was of such a character as to present to the court a case which was likely to procure the injunction, but which was in fact different from the case which really existed (*p*). Nor will the court deal so strictly with a party applying on notice, where his opponent does not appear, as with a party applying *ex parte* (*q*).

The plaintiff need not state facts which are supposed to raise some point of law which is really unsustainable (*r*).

Additional grounds for dissolution.

Failure to attend to be cross-examined (*s*), and delay in complying with an undertaking to amend the writ by adding a party as plaintiff (*a*), are also grounds for dissolution (*b*).

Irregularities.

An injunction may be dissolved because it has been irregularly granted (*c*), but the irregularity may be waived by the conduct of the parties (*d*).

When injunction granted against two or more.

631. Where an injunction has been granted against two or more persons, and one of them applies to discharge it, the order will be made only as to the party applying (*e*).

When order granted in absence of parties.

If an order is made on motion and affidavit of service in the absence of parties, the court can in the order reserve liberty to the absent party to move to discharge the order (*f*).

Party consenting to injunction cannot withdraw.

A defendant who has deliberately consented to an injunction will not be allowed afterwards to withdraw his consent merely because he subsequently discovers that he might have a good defence to the action (*g*).

(*n*) *Dalglish* v. *Jarvie* (1850), 2 Mac. & G. 231, 241.

(*o*) *Clifton* v. *Robinson* (1853), 16 Beav. 355; but mere ignorance of what a party might have known is not equivalent to concealment, so as to amount to improper conduct (*Semple* v. *London and Birmingham Rail. Co.* (1838), 1 Ry. & Can. Cas. 480, 494).

(*p*) *Brown* v. *Newall* (1837), 2 My. & Cr. 558, 571; see *Castelli* v. *Cook* (1849), 7 Hare, 89, 94.

(*q*) *Maclaren* v. *Stainton* (1852), 16 Beav. 279.

(*r*) *Weston* v. *Arnold* (1873), 8 Ch. App. 1084.

(*s*) *O'Callaghan* v. *Barnad*, [1875] W. N. 37.

(*a*) See p. 272, *ante*.

(*b*) *Spanish General Agency Corporation* v. *Spanish Corporation, Ltd.*, [1890] W. N. 158; see also *Stevens* v. *Keating* (1847), 2 Ph. 333, where the injunction was dissolved on the ground that the plaintiff had not complied with the special directions upon which it was granted.

(*c*) *Sieveking* v. *Behrens* (1837), 2 My. & Cr. 581; *Re Johnstone, Ex parte Abrams* (1884), 50 L. T. 184.

(*d*) *Davile* v. *Peacock* (1740), Barn. (CH.) 25, 27; *Travers* v. *Stafford* (*Lord*) (1750), 2 Ves. Sen. 19; *Vipan* v. *Mortlock* (1817), 2 Mer. 476; *Glascott* v. *Lang* (1838), 3 My. & Cr. 451; *Bickford* v. *Skewes* (1839), 4 My. & Cr. 498; *Bell* v. *Hull and Selby Rail. Co.* (1840), 1 Ry. & Can. Cas. 616; *Jennings* v. *Brighton Intercepting and Outfall Sewers Board* (1872), 4 De G. J. & Sm. 735, 747; see *Cardinall* v. *Molyneux* (1861), 4 De G. F. & J. 117, 123.

(*e*) *Bramwell* v. *Halcomb* (1836), 3 My. & Cr. 737

(*f*) *Mapp* v. *Elcock* (1853), 22 L. J. (CH.) 707.

(*g*) *Elsas* v. *Williams* (1884), 54 L. J. (CH.) 336, *aliter*, however, in the case of a mistake. As to mistake, see *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673; *Wilding*

PART VII. Dissolution of Injunction.

No order for dissolution necessary when action dismissed.

632. When an action is dismissed, no order for dissolution of the injunction is necessary—the injunction is *ipso facto* discharged as of course (*h*), but the dismissal does not prevent the plaintiff from bringing another action for an injunction on a new (*i*) or altered (*k*) state of circumstances.

v. *Sanderson*, [1897] 2 Ch. 534, C. A.; and where counsel exceeds his authority in agreeing to a compromise, see *Neale* v. *Gordon Lennox*, [1902] A. C. 465; title BARRISTERS, Vol. II., pp. 398 *et seq.*

(*h*) *Blennerhassett* v. *Scanlan* (1826), 1 Hog. 363; *Willis* v. *Yates* (1834), Coop. *temp.* Brough. 498; *Green* v. *Pulsford* (1839), 2 Beav. 70. A suit does not become abated by the marriage, death, or bankruptcy, or devolution of estate by operation of law of any party (R. S. C., Ord., 17, r. 2). Formerly the abatement of the suit did not dissolve an injunction; see *Ferrand* v. *Hamer* (1838), 4 My. & Cr. 143, 147.

(*i*) *Liverpool Corporation* v. *Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852, C. A.; *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, 341, C. A.

(*k*) *Castelli* v. *Cook* (1849), 7 Hare, 89, 99; *Liverpool Corporation* v. *Chorley Waterworks Co.*, *supra.*

INJURIA ABSQUE DAMNO.

See ACTION; TORT.

INJURIOUS AFFECTION.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION.

INLAND BILL.

See BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS.

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INNS AND INNKEEPERS.

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PART I. Definitions.

Part I.—Definitions.

Common inns. Common innkeeper.

633. Common inns are instituted for passengers and wayfaring men (*a*), and a common innkeeper is a person who makes it his business to entertain them and provide lodging and necessaries for them (*b*).

Inn.

An inn may be described as a house where the traveller is furnished with everything for which he has occasion upon his way (*c*); or, again, as a house the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received (*d*). In other words, an innkeeper is a person who receives travellers and provides lodging and necessaries for them and their horses and attendants, and employs servants for this purpose and for the protection of travellers lodging in his inn and of their goods (*e*).

Innkeeper.

Innkeeper is a common innkeeper.

An innkeeper is called a common innkeeper (*f*) because, within the limits of his liability to receive and entertain guests, he is equally bound to receive and entertain all persons, and is not entitled to pick and choose between them or to accept certain persons as guests and refuse others (*g*).

Use of house, not name, must be looked at.

In order to decide whether a house is an inn the use to which it is applied must be looked at, and not merely the name by which it is designated (*h*), so that the question whether a particular house is or is not an inn is always a question of fact (*i*). And though an inn frequently has stables annexed to it and forming part of it, these are in no way a necessity towards constituting a house an

(*a*) *Calye's Case* (1584), 8 Co. Rep. 32 a; 1 Smith, L. C., 11th ed., p. 119. The judgment of the court says (at p. 32 b), "For the Latin word for an inn is *diversorium*, because he that lodges there is *quasi divertens se a via;* and, so *diversoriolum*."

(*b*) Bac. Abr., tit. Inns and Innkeepers (B), 6th ed., p. 660.

(*c*) *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283, *per* BAYLEY, J., at p. 286. As to usages recognised among innkeepers as to hiring furniture etc., see title CUSTOM AND USAGES, Vol. X., p. 275.

(*d*) *Thompson* v. *Lacy, supra, per* BEST, J., at p. 287; and see *Lamond* v. *Richard*, [1897] 1 Q. B. 541, C. A., *per* Lord ESHER, M.R.

(*e*) *Luton* v. *Bigg* (1691), Skin. 291. "Hospitatores" (innkeepers) are those "qui hospitia com' tenent ad hospitandos homines per partes ubi hujusmodi hospitia existent transeuntes, et in eisdem hospitandis eorum bona et catalla infra hospitia illa existentia, absque subtractione seu amissione custodire die et nocte tenentur" (Fitz. Nat. Brev. 94 b (9th ed.) (Hale's Commentary has an English translation)); *Calye's Case, supra; Allen* v. *Smith* (1862), 12 C. B. (N. S.) 638; *Orchard* v. *Bush & Co.*, [1898] 2 Q. B. 284, *per* KENNEDY, J., at p. 288.

(*f*) "An innkeeper is called in the law *communis hospitator*, the which signifies the nature of his office and employment" (*Luton* v. *Bigg, supra*).

(*g*) *Luton* v. *Bigg, supra, sub nom. Newton* v. *Trigg* (1691), 1 Show. 268, *per* EYRES, J., at p. 268; *Parker* v. *Flint* (1698), 12 Mod. Rep. 254; *Lane* v. *Cotton* (1701), 12 Mod. Rep. 472, *per* HOLT, C.J., at p. 483; *Browne* v. *Brandt*, [1902] 1 K. B. 696, *per* Lord ALVERSTONE, C.J., at p. 698. As to remedies against innkeepers, see pp. 314, 322, *post*.

(*h*) *Thompson* v. *Lacy, supra; R.* v. *Rymer* (1877), 2 Q. B. D. 136, C. C. R.

(*i*) *Jones* v. *Osborn* (1785), 2 Chit. 484; *Lamond* v. *Richard, supra;* compare *Broadwood* v. *Granara* (1854), 10 Exch. 417.

inn (*k*). Moreover, a house, called itself by the name of an inn, may not be an inn, even though it is a house of public entertainment (*l*); for every alehouse is not an inn (*m*). But if an inn is used for the common selling of ale, it is also an alehouse; and if an alehouse lodges and entertains travellers, it is also an inn (*m*). Alehouse.

A house, on the other hand, which calls itself a "tavern and coffee-house" may in fact be an inn (*n*), although by a "tavern" is usually understood a house in which wines and other liquors are sold (*o*), and in which a table is furnished (*p*); and by a "coffee-house" is usually meant a house where such refreshment as tea and coffee are supplied (*q*), and neither a mere tavern (*r*) nor a mere coffee-house is an inn (*s*). Tavern. Coffee-house.

An "hotel" may be an inn (*t*), and no doubt is an inn in most cases (*a*), and what is known as a "temperance hotel" may Hotel. Temperance hotel.

(*k*) *Thompson* v. *Lacy* (1890), 3 B. & Ald. 283.

(*l*) *Pidgeon* v. *Legge* (1857), 21 J. P. 743 (case of a house where ale was sold and a card was exposed in the window with the word "beds" upon it).

(*m*) 1 Burn's Justice of the Peace and Parish Officer, 1st ed., p. 11; *Pidgeon* v. *Legge*, *supra*; *Anon.* (1611), 1 Bulst. 109; *Newton* v. *Trigg* (1691), 1 Show. 268. It must be remembered, however, that the Alehouse Act, 1828 (9 Geo. 4, c. 61) (now repealed), contained a definition of the word "inn" which was entirely different from the common law meaning of the word. By s. 37 (*ibid.*), "inn shall be deemed to include any inn, alehouse or victualling house, and the words 'inn, alehouse, or victualling house' shall be deemed to include all houses in which shall be sold by retail any excisable liquor to be drunk or consumed on the premises." In the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), the phrase "licensed premises" is used, and not the word "inn." See title INTOXICATING LIQUORS.

(*n*) *Thompson* v. *Lacy*, *supra*; see Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41), s. 4.

(*o*) See Jacob's Law Dictionary, *sub voce* "Tavern"; Willcock's Laws relating to Inns etc. (1829), p. 18. In *Webb* v. *Fagotti Brothers* (1898), 79 L. T. 683, CHITTY, L.J., said, at p. 684: "I agree that the words 'hotel' and 'tavern' are undergoing a change in their meaning, there being temperance hotels and temperance taverns as well as houses for the sale of excisable liquors." For a case of the use of the word "tavern," see stat. (1553) 7 Edw. 6, c. 5, s. 3 (now repealed).

(*p*) *Thompson* v. *Lacy*, *supra*, *per* BAYLEY, J., at p. 286.

(*q*) *Ibid.*; and see *Fitz* v. *Iles*, [1893] 1 Ch. 77, C. A.

(*r*) *Thompson* v. *Lacy*, *supra*.

(*s*) See *Doe* d. *Pitt* v. *Laming* (1814), 4 Camp. 73, 77.

(*t*) *Jones* v. *Osborn* (1785), 2 Chit. 484. In this case the declaration was against the "keeper of a certain common and public hotel for the reception, lodging and entertainment of guests" for the loss of a bank note. The defendant demurred, assigning that the said hotel or house was not averred to be a common and public inn nor within the custom of the realm as to innkeepers. The court thought these objections were more properly raised upon the trial, as the law must depend upon the facts of the case (see *Broadwood* v. *Granara* (1854), 10 Exch. 417; see also Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41), s. 4, and p. 305, *post*).

(*a*) See, for example, *Dixon* v. *Birch* (1873), L. R. 8 Exch. 135; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, C. A.; *Cunningham* v. *Philp* (1896), 12 T. L. R. 352; *Lamond* v. *Richard*, [1897] 1 Q. B. 541, C. A.; *Orchard* v. *Bush & Co.*, [1898] 2 Q. B. 284. In *Lamond* v. *Richard*, *supra*, however, Lord ESHER, M.R., said, at p. 545: "I think it is a question of fact what was the intention of those who carried on the business of the hotel. . . . I think it open to argument that the large London hotels do not hold themselves out as receiving customers according to the custom of England—at any rate such a matter would be a question of fact."

PART I. Definitions.

Residential hotel.

Private hotel.

Boarding-house.

Shop.

Restaurant.

Public-house.

be an inn just as well as an hotel in respect of which a licence is held for the sale of intoxicating liquor (*b*). On the other hand a "residential hotel," where suites of apartments or single rooms are let to lodgers, who are also provided with food if they desire it, but in respect of which no licence is held for the sale of intoxicating liquors, and where no one other than a lodger is supplied with food, although it is for some purposes an hotel (*c*), is probably not an inn. A house used as a "private hotel," that is to say for the reception of persons who desire to go and live there (*d*), appears not to be an inn. So, too, the keeper of a boarding-house may for some purposes be an hotel-keeper (*e*), though clearly not keeping an inn. A place under the same roof as an hotel, but entirely separate from it, with a separate entrance and being in fact a mere shop in which spirits are sold across a counter is not an inn, even if the hotel itself be an inn (*f*). Nor is a mere restaurant an inn (*g*).

A "public-house" may be an inn, but is not to be assumed to be one (*h*). As the term is ordinarily used, a public-house differs from an inn or hotel, in respect of which a licence is held for the sale of intoxicating liquors, in that the public-house does not provide for the reception of travellers desirous of sleeping and staying there as guests (*i*). A "private hotel" is not a public-house by reason merely of the sale of intoxicating liquors to guests and travellers staying in the house and to no other persons (*k*). The term public-house, however, is often used as

(*b*) *Cunningham* v. *Philp* (1896), 12 T. L. R. 352.

(*c*) *Re Chapman, Ex parte Whiteley* (1894), 11 T. L. R. 92; *sub nom. Re Chapman, Whiteley* v. *Haydon*, 1 Mans. 415; *Smith* v. *Scott* (1832), 9 Bing. 14; *Re Jones, Ex parte Thorne* (1876), 3 Ch. D. 457, C. A.

(*d*) *Devonshire* (*Duke*) v. *Simmons* (1894), 11 T. L. R. 52, *per* STIRLING, J., at p. 53. Such a place would, no doubt, sometimes be called a "residential hotel," or a "private residential hotel."

(*e*) *Gibson* v. *King* (1842), 10 M. & W. 667, in which case the decision was under the words "victuallers, keepers of inns, taverns, hotels, or coffee-houses" in the since repealed stat. (1825), 6 Geo. 4, c. 16, relating to bankruptcy. In deciding *Smith* v. *Scott*, *supra*, which turned upon the same words, TINDAL, C.J., said, at p. 17: "It is clear that the word 'hotel' is not used in the sense of the old word 'hostel,' for that means what is now termed an 'inn,' and as the word 'inn' immediately precedes, it could scarcely have been intended to designate the same thing by both. The modern word is introduced from the French, and rather implies a house to which people resort for lodgings, than the sort of entertainment procured only at an inn"; see also *Re Jones, Ex parte Thorne* (1876), 3 Ch. D. 457, C. A.; *Re Hughes, Ex parte Daniell* (1843), 7 Jur. 334; *King* v. *Simmonds* (1848), 1 H. L. Cas. 754; and compare *Scarborough* v. *Cosgrove*, [1905] 2 K. B. 805, C. A. As to the position of a boarding-house keeper, see also title LANDLORD AND TENANT.

(*f*) *R.* v. *Rymer* (1877), 2 Q. B. D. 136, C. C. R.

(*g*) See *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92. But see *Orchard* v. *Bush & Co.*, [1898] 2 Q. B. 284.

(*h*) *Collis* v. *Selden* (1868), 37 L. J. (C. P.) 233, *per* BOVILL, C.J., at p. 234; see also *Pease* v. *Coats* (1866), L. R. 2 Eq. 688; and see Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41), s. 4.

(*i*) Compare Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 43 (4), where however, the words used as to an inn or hotel are "an inn or hotel for the reception of guests and travellers desirous of dwelling therein." The phrase "public-house" is often used as meaning a fully licensed house, that is, a house in respect of which a retail spirit licence is held; and such a licence is now called a publican's licence; see Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52, and title INTOXICATING LIQUORS.

(*k*) *Devonshire* (*Duke*) v. *Simmons*, *supra*.

denoting a fully-licensed house (*l*), that is, a house in respect of which a licence is held for the sale of spirits by retail for consumption on the premises, in contradistinction to a house (sometimes called a beer-house or a wine-house) in respect of which a licence is held merely for the sale of beer or wine (*m*). Fully-licensed house as distinguished from beer-house or wine-house.

A victualling house appears to signify a house in which victuals are sold to the public generally (*n*), and a confectioner who supplies refreshments in the way of luncheon keeps a victualling-house (*o*); but one who lets rooms to lodgers to whom alone he supplies food and drink does not keep a victualling house, even though he also provides his lodgers' horses with stable room and hay (*p*). A mere victualling-house keeper appears not to be an innkeeper. Victualling-house.

The keeper of a lodging-house makes a previous contract for lodging for a set time, usually a week or a month, with each lodger who comes (*q*), and does not hold himself out to receive all persons in the same way as an innkeeper does. A mere lodging-house-keeper, therefore, is not an innkeeper (*r*). Lodging-house keeper.

Nor is the keeper of a boarding-house an innkeeper (*s*), but whether a particular house is an inn or a boarding-house is a question of fact (*t*). At a boarding-house a guest may have the use of certain rooms in common with others, his own bedroom, his board, and the attendance of servants in exchange for an agreed periodical payment (*a*), but this does not make the boarding house an inn. Boarding-house keeper.

The word "inn" in the Innkeepers' Liability Act, 1863, which word in its ordinary signification has a more confined or a different meaning, means in that Act (except where the nature of the provision or the context of that Act excludes such construction) any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests; and the word "innkeeper" means the keeper of any such place (*b*). Statutory definition of "inn" and "innkeeper."

(*l*) See *Sealey* v. *Tandy*, [1902] 1 K. B. 296, *per* Lord ALVERSTONE, C.J., at p. 299.

(*m*) See Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 31; *Pease* v. *Coats* (1866), L. R. 2 Eq. 688.

(*n*) See Jacob's Law Dictionary, *sub voce* "Victuals."

(*o*) *Re Nuttall, R.* v. *Sherrard* (1888), 4 T. L. R. 540.

(*p*) *Parkhouse* v. *Forster* (1699), 5 Mod. Rep. 427; S. C. *sub nom. Parker* v. *Flint* (1698), 12 Mod. Rep. 254.

(*q*) *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283, *per* BEST, J., at p. 287; *Parker* v. *Flint* (1698), Holt (K. B.), 366; *Cunningham* v. *Philp* (1896), 12 T. L. R. 352. As to lodgers, see titles ELECTIONS, Vol. XII., pp. 168, 169; LANDLORD AND TENANT. As to common lodging-houses, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*r*) *Holder* v. *Soulby* (1860), 8 C. B. (N. S.) 254; *Parker* v. *Flint, supra;* reported also Holt (K. B.), 366; S. C. *sub nom. Parkhouse* v. *Forster supra.*

(*s*) *Dansey* v. *Richardson* (1854), 3 E. & B. 144, *per* WIGHTMAN, J., at p. 155; *Houlder* v. *Soulby, supra, per* ERLE, C.J., at p. 266; *Cunningham* v. *Philp, supra; Scarborough* v. *Cosgrove*, [1905] 2 K. B. 805, C. A.

(*t*) *Cunningham* v. *Philp, supra.* For restrictive covenants as to boarding houses, see title LANDLORD AND TENANT.

(*a*) *Dansey* v. *Richardson, supra, per* COLERIDGE, J., at p. 157.

(*b*) Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41), s. 4. In spite of

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Anyone may keep an inn.

The keeping of an inn is not a franchise, and anyone may keep an inn without any licence permitting him to do so (*c*), and may also erect a sign before his door without licence, if he likes to do so (*d*). But an innkeeper by opening his house as an inn offers it to the use of the public as such, and thereupon the common law imposes on him certain duties and gives him certain rights (*e*).

Part II.—Liabilities of Innkeepers.

SECT. 1.—*To Receive and Entertain Guest.*

SUB-SECT. 1.—*Extent of Liability.*

Liability of innkeeper to receive guests.

634. An innkeeper is bound by the common law or custom of the realm (*f*) to receive (*g*), and lodge (*h*) in his inn all comers (*i*)

much verbiage, this is merely a definition identical with the common law meaning of an inn; see p. 302, *ante*, and compare title INHABITED HOUSE DUTY, pp. 185, 186, *ante*.

(*c*) Bac. Abr., tit. Inns and Innkeepers (A.); *R.* v. *Collins* (1623), 2 Roll. Rep. 345 (the name of this case is given in 3 Burr., at p. 1501); Resolution of the judges (1624), Hut. 99; 2 Roll. Abr. 84. In Hut. 99, it is said that TANFIELD, C.B., thought that inns were licensed first and originally by the justices in eyre, but nothing could be shown to that purpose. But all the justices disagreed, and LEA, C.J., said that there was not any such thing in eyre, but because aliens were abused in the inns it was upon complaint thereof provided that they should be well lodged, and inns were assigned to them by justices in eyre.

(*d*) A sign is in no way essential to the keeping of an inn, though it is evidence thereof (*Parker* v. *Flint* (1698), 12 Mod. Rep. 254). To pull down a sign appears to be evidence that the house is no longer an inn, but if after pulling down the sign the house is still used for receiving and entertaining travellers it is just as much an inn as if it had a sign (*R.* v. *Collins*, *supra*).

(*e*) *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, C. A., *per* Lord ESHER, M.R., at pp. 19, 20. As to the duties of an innkeeper, see *infra*; and as to his rights, see pp. 310, 323 *et seq.*, *post*.

(*f*) *White's Case* (1558), Dyer, 158 b; *Warbrook* v. *Griffin* (1609), 2 Brownl. 254; *Dansey* v. *Richardson* (1854), 3 E. & B. 144, *per* COLERIDGE, J., at p. 159; *Medawar* v. *Grand Hotel Co.*, *supra*, *per* Lord ESHER, M.R., at p. 19; *Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501, C. A., *per* Lord ESHER, M.R., at p. 503; *Lamond* v. *Richard*, [1897] 1 Q. B. 541, C. A., *per* Lord ESHER, M.R., at p. 545.

(*g*) *Lane* v. *Cotton* (1701), 12 Mod. Rep. 472, *per* Lord HOLT, C.J., at p. 483; *York* v. *Grindstone* (1704), 1 Salk. 388; *Kirkman* v. *Shawcross* (1794), 6 Term Rep. 14, 17; *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283, *per* BAYLEY, J., at p. 287; *R.* v. *Ivens* (1835), 7 C. & P. 213; *Scarfe* v. *Morgan* (1838), 4 M. & W. 270, 275; *Hawthorn* v. *Hammond* (1844), 1 Car. & Kir. 404; *Dansey* v. *Richardson*, *supra*, *per* COLERIDGE, J., at p. 159; *Robins & Co.* v. *Gray*, *supra*, *per* Lord ESHER, M.R., at p. 504; and see *R.* v. *Rymer* (1877), 2 Q. B. D. 136, C. C. R.; 1 Hawk. P. C. (by Curwood) 714; *Gordon* v. *Silber* (1890), 25 Q. B. D. 491.

(*h*) *Anon.* (1503), Keil. 50; *Anon.* (1460), Y. B. 39 Hen. 6, fo. 18, cited Bro. Abr., tit. Action sur le case, pl. 76, *per* MOYLE, J.; *R.* v. *Collins*, *supra*; *Newton* v. *Trigg* (1691), 1 Show. 268, *per* EYRES, J., at p. 268; *Buryess* v. *Clements* (1815), 4 M. & S. 306; *Thompson* v. *Lacy*, *supra*, at p. 287; *R.* v. *Ivens* (1835), 7 C. & P. 213, *per* COLERIDGE, J., at p. 216; *R.* v. *Rymer*, *supra*; *Lamond* v. *Richard*, *supra*, *per* Lord ESHER, M.R., at p. 545; 1 Hawk. P. C. (by Curwood) 714.

(*i*) *Newton* v. *Trigg*, *supra*, *per* EYRES, J., at p. 268; *Lane* v. *Cotton*, *supra*,

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who are travellers (*k*), and to entertain them (*l*) at reasonable prices (*m*) without any special (*n*) or previous (*o*) contract, unless he has some reasonable ground of refusal (*p*).

In addition to his obligation to receive and entertain a traveller, an innkeeper is bound to receive (*q*) in the stables kept with the inn (*r*), and to feed (*s*) with reasonable provender in his inn (*t*), a traveller's horse, and to receive his carriage (*a*), and also all goods with which a person ordinarily travels (*b*), or which are his luggage (*c*), whether in fact belonging to the traveller or not (*d*). It seems that the innkeeper is bound to receive all goods brought with him by a traveller, unless there is some reason to the contrary in the exceptional character of the things brought (*e*). At any rate

Liability to receive traveller's horse and carriage.

per Lord HOLT, C.J., at p. 483; *Kirkman* v. *Shawcross* (1794), 6 Term Rep. 14, *per* Lord KENYON, C.J., at p. 17; *R.* v. *Ivens* (1835), 7 C. & P. 213, *per* COLERIDGE, J., at p. 219; *Hawthorn* v. *Hammond* (1844), 1 Car. & Kir. 404, *per* PARKE, B., at p. 407; *Johnson* v. *Midland Rail. Co.* (1849), 4 Exch. 367, *per* PARKE, B., at pp. 372, 373; *Browne* v. *Brandt*, [1902] 1 K. B. 696, *per* Lord ALVERSTONE, C.J., at p. 698.

(*k*) *Grimston* v. *An Innkeeper* (1627), Het. 49; *Newton* v. *Trigg* (1691), 1 Show. 268, *per* HOLT, C.J., at p. 269; *R.* v. *Luellin* (1701), 12 Mod. Rep. 445; *R.* v. *Rymer* (1877), 2 Q. B. D. 136, C. C. R.; *Lamond* v. *Richard*, [1897] 1 Q. B. 541, C. A., *per* Lord ESHER, M.R., at p. 545; *Sealey* v. *Tandy*, [1902] 1 K. B. 296; and see *Pidgeon* v. *Legge* (1857), 21 J. P. 743, *per* WATSON, B., at p. 744.

(*l*) *Parker* v. *Flint* (1698), 12 Mod. Rep. 254; *York* v. *Grindstone* (1704), 1 Salk. 388; *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283, 287; *R.* v. *Rymer* (1877), 2 Q. B. D. 136, C. C. R.; *Gordon* v. *Silber* (1890), 25 Q. B. D. 491; and see *Newton* v. *Trigg*, *supra*, *per* HOLT, C.J., at p. 269; 1 Hawk. P. C. (by Curwood) 714.

(*m*) *Crisp* v. *Pratt* (1639), Cro. Car. 549; *Parker* v. *Flint*, *supra*; *Kirkman* v. *Shawcross*, *supra*, *per* Lord KENYON, C.J., at p. 17; *Thompson* v. *Lacy*, *supra*; and see declaration in *Stanyon* v. *Davis* (1704), 6 Mod. Rep. 223.

(*n*) *Saunders* v. *Plummer* (1662), O. Bridg. 223; *Thompson* v. *Lacy*, *supra*.

(*o*) *Parker* v. *Flint*, *supra*.

(*p*) *White's Case* (1558), Dyer, 158 b; *Bennett* v. *Mellor* (1793), 5 Term Rep. 273, *per* GROSE, J., at p. 276; cited in note to *York* v. *Grindstone* (1704), 1 Salk. (6th ed.) 388; *Pidgeon* v. *Legge*, *supra*, *per* BRAMWELL, B., at p. 744; *Gordon* v. *Silber* (1890), 25 Q. B. D. 491; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, C. A., *per* Lord ESHER, M.R., at p. 20; *Browne* v. *Brandt*, *supra*; and see *Lovett* v. *Hobbs* (1680), 2 Show. 127.

(*q*) *Saunders* v. *Plummer*, *supra*; *Scarfe* v. *Morgan* (1838), 4 M. & W. 270, 275; *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A., *per* COTTON, L.J., at p. 493.

(*r*) See form of indictment in *R.* v. *Ivens*, *supra*, and p. 312, *post*. It would seem that where no stables are kept with the inn (as in *Thompson* v. *Lacy*, *supra*) an innkeeper is not bound to receive a guest's horse any more than if the stables were full.

(*s*) *Scarfe* v. *Morgan*, *supra*, at p. 275.

(*t*) *Stanyon* v. *Davis*, *supra*.

(*a*) *Turrill* v. *Crawley* (1849), 13 Q. B. 197, *per* COLERIDGE, J., at p. 202; *Mulliner* v. *Florence*, *supra*, *per* COTTON, L.J., at p. 493.

(*b*) *Broadwood* v. *Granara* (1854), 10 Exch. 417, *per* PARKE, B., at p. 423; *Gordon* v. *Silber*, *supra*.

(*c*) *Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501, C. A., *per* Lord ESHER, M.R., at p. 504.

(*d*) *Robins & Co.* v. *Gray*, *supra*.

(*e*) *Robins & Co.* v. *Gray*, *supra*, *per* Lord ESHER, M.R., at p. 504; *Threfall* v. *Borwick* (1875), L. R. 10 Q. B. 210, Ex. Ch., where Lord COLERIDGE, C.J., said, at p. 212: "I may say that I should be inclined to agree if a guest brought a piano with him for his own amusement that, according to the advanced

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he is bound to receive all goods which by his public profession he engages to receive (*f*).

Power to demand payment in advance.

But an innkeeper is not bound to put trust in his guest for payment, and may therefore demand payment of a reasonable sum in advance (*g*), and if a traveller wishes to insist upon his right to be received he must tender a reasonable sum unless the circumstances are such that the question of credit is not a matter weighing with the innkeeper (*h*).

Trespass in a common inn.

635. As the law gives a right to enter a common inn, if a person entering the inn commits a trespass, such as carrying away anything, he is a trespasser *ab initio*, but no act of omission can be a trespass, and therefore a refusal to pay for food or drink supplied by an innkeeper cannot make the guest a trespasser (*i*).

No liability on persons other than innkeepers.

636. The obligation to receive and entertain guests is, moreover, confined to innkeepers, that is to say, persons who keep inns properly so called (*k*), no such obligation resting upon the keeper of a mere lodging-house (*l*), or a mere boarding-house (*m*), or a mere alehouse (*n*).

usages of society, the innkeeper might well be held to be bound to receive it, if he has room for it. But it is quite unnecessary to decide that question."

(*f*) *Broadwood* v. *Granara* (1854), 10 Exch. 417, *per* PARKE, B., at p. 423.

(*g*) *Anon.* (1460), Y. B. 39 Hen. 6, fo. 18, cited Bro. Abr., tit. Action sur le case, pl. 76, *per* DANBY. J.; *A.-G.* v. *Capel* (1494), Y. B. 10 Hen. 7, fo. 7, *per* HUSSEY, C.J., at fo. 8; *Pinchon's Case* (1611), 9 Co. Rep. 87; *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A., *per* BRAMWELL, L.J., at p. 488; and see *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283, *per* BAYLEY, J., at p. 287, who said, "he is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided."

(*h*) *R.* v. *Ivens* (1835), 7 C. & P. 213. COLERIDGE, J., in summing up to the jury, said, at p. 220: "With respect to the non-tender of money by the prosecutor it is now a custom so universal with innkeepers to trust that a person will pay before he leaves an inn that it cannot be necessary for a guest to tender money before he goes into an inn; indeed, in the present case no objection was made that [the traveller] did not make a tender; and they did not even insinuate that he could not pay for whatever entertainment might be provided to him. I think, therefore, that it cannot be set up as a defence." As to the offence under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13 (1), of obtaining food in an eating-house without paying for it, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 350, note (*i*). For this offence an intention to defraud is essential (*R.* v. *Muirhead* (1908), 25 T. L. R. 88, C. C. A.).

(*i*) *Six Carpenters' Case* (1610), 8 Co. Rep. 146 a; 1 Smith, L. C., 11th ed. p. 132. This case was decided at a time when the distinction between an inn and a mere tavern was not clearly recognised, any more than the distinction between a traveller and a guest who was not a traveller. See also title TRESPASS.

(*k*) *Sealey* v. *Tandy*, [1902] 1 K. B. 296. A similar kind of obligation to shoe a horse seems at one time to have attached to the trade of a shoeing-smith; see *Anon.* (1503), Keil. 50; *Lane* v. *Cotton* (1701), 12 Mod. Rep. 472, 484; *Parsons* v. *Gingell* (1847), 4 C. B. 545, 555, note (a); *Johnson* v. *Midland Rail. Co.* (1849), 4 Exch. 367, 372, 373.

(*l*) *Parker* v. *Flint* (1698), 12 Mod. Rep. 254: "The verdict finds he let lodgings only, which shows him not compellable to entertain anybody and that none could come there without a previous contract; that he was not bound to sell at reasonable rates, or to protect his guests."

(*m*) *Dansey* v. *Richardson* (1854), 3 E. & B. 144, *per* COLERIDGE, J., at p. 159: "In the case of an innkeeper there is, in the absence of any lawful excuse, a necessity to receive me which does not exist in regard to the boarding-house keeper."

(*n*) *Pidgeon* v. *Legge* (1857), 21 J. P. 743; *Sealey* v. *Tandy*, *supra*, *per* Lord

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No liability to receive other than travellers.

Traveller may become lodger.

637. An innkeeper is not bound to receive or provide for anyone who is not a traveller (*o*). Whether a person is a traveller seems to be a question of fact in each case (*p*).

Whether the capacity in which a person goes to an inn is that of a traveller is also a question of fact (*q*), and if a person who has gone to an inn in the capacity of a traveller stays at the inn for a considerable period it is a further question of fact how long he retains the character of a traveller so that the innkeeper is bound to allow him to remain (*r*). Mere length of stay is not conclusive, but is one of the circumstances to be taken into consideration (*s*). If a guest has ceased to be a traveller and has become a mere lodger or boarder, the innkeeper may refuse to lodge or entertain him any longer and may turn him out after reasonable notice (*a*).

It seems that an innkeeper is bound to receive the horse of a traveller although the traveller does not himself want lodging or

ALVERSTONE, C.J., at p. 299: "This house was not an inn, but only a public house, a fully licenced house." But in *A.-G.* v. *Capel* (1494), Y. B. 10 Hen. 7, fo. 8, HUSSEY, C.J., said that a "victualler" will be compelled to sell his victual if the purchaser has tendered him ready payment, otherwise not. Quod BRIAN affirmavit. And in *Anon.* (1460), Y. B. 39 Hen. 6, fo. 18, cited in Bro. Abr., tit. Action sur le case, pl. 76, it is said: "It is decided by MOYLE, J., if an innkeeper refuses to lodge me I shall have an action on the case and the same law if a victualler refuses to give me victuals."

(*o*) *R.* v. *Luellin* (1701), 12 Mod. Rep. 445; *R.* v. *Rymer* (1877), 2 Q. B. D. 136, C. C. R.; *Sealey* v. *Tandy*, [1902] 1 K. B. 296; and see *Lamond* v. *Richard*, [1897] 1 Q. B. 541; C. A., *per* CHITTY, L.J., at p. 548: "The custom of England does not extend to persons who are in an inn as lodgers or boarders."

(*p*) *R.* v. *Rymer*, *supra*. In this case the prosecutor lived in a town within twelve hundred yards of the place where he demanded to be provided with refreshment, and was merely walking about the town for his own recreation and amusement. KELLY, C.B., said that the prosecutor was in no sense a traveller. But in *Orchard* v. *Bush & Co.*, [1898] 2 Q. B. 284, KENNEDY, J., said, at p. 289: "Looking at the reason of the thing, I should have thought that any person, who was neither an inhabitant of the house nor a private guest of the innkeeper or his family, but who came into the house as a guest to get such accommodation as it afforded and he was willing to pay for it, was a traveller. It does not seem to make any difference whether his journey be a long or a short one." In *Pidgeon* v. *Legge* (1857), 21 J. P. 743, however, WATSON, B., said, at p. 744: "Even although it were an inn, the plaintiff was not there as a traveller, but was using it as an alehouse. A house may be an inn for the accommodation of travellers, and it may also be an alehouse." As to the cases in which a person is a guest, see p. 318, *post*.

(*q*) *Lamond* v. *Richard*, *supra*, *per* Lord ESHER, M.R., at pp. 545, 546.

(*r*) *Ibid.*

(*s*) *Lamond* v. *Richard*, *supra*, *per* Lord ESHER, M.R., at p. 546. It was said by DODERIDGE, J., in *Gulielm's Case* (1625), Lat. 88: "According to the old law a traveller was so called the first day, because it is not known why he comes; the second day he is called a *Hogen Hinde;* and the third day a menial servant; and according to the aforesaid articles an innkeeper was responsible for him, as his servant, in the leet." In *Harland's Case* (1641), Clay. 97, it was ruled that *Calye's Case* (1584), 8 Co. Rep. 32 a, is not law in limiting a guest to three days, and it was held that soldiers who had been fourteen days at an inn were guests.

(*a*) *Lamond* v. *Richard*, *supra*.

SECT. 1. To Receive and Entertain Guest.

entertainment at the inn (*b*), but that the rule is different with regard to the goods of a traveller (*c*).

Traveller's dog.

Apparently an innkeeper is bound to receive, if he has accommodation for it, a dog which a traveller brings with him, though he is not bound to receive it into the house (*d*), at any rate if he is willing to put it up in a stable or outhouse (*e*).

No right to particular room.

638. A traveller, although entitled to reasonable and proper accommodation, is not entitled to insist on a particular apartment (*f*), and if a guest annoys other guests in a particular room and refuses on request by the innkeeper to leave that room, the innkeeper may use such force as is necessary to remove such guest therefrom (*g*).

The reasonableness or fitness of accommodation provided is a question of fact for the jury (*h*).

An innkeeper is not bound to find showrooms for his guest, but only convenient lodging rooms and lodging (*i*). Nor is he bound to provide a guest with post-horses even though he in fact keeps post-horses for hire (*k*), nor, apparently, to supply clothes or wearing apparel (*l*).

Right to refuse accommodation.

639. The fact that the inn is full is a reasonable ground for refusal to provide a traveller with shelter and accommodation for the night (*m*). So is the fact that all the bedrooms in the inn are full, even if a public room is unoccupied and the traveller demands to be allowed to pass the night there (*n*).

The fact that a traveller insists upon bringing a dog with him into an inn may be reasonable ground for refusal to provide him with refreshment (*o*); and it is a sufficient ground for refusal to

(*b*) *York* v. *Grindstone* (1704), 1 Salk. 388, where the majority of the court held that the plaintiff was a guest by leaving his horse, although he never went into the inn himself, as much as if he had stayed himself, but said it would have been otherwise if he had left a trunk or dead thing (*Lane* v. *Cotton* (1701), 12 Mod. Rep. 472, 480; see also *Drope* v. *Thaire* (1626), Lat. 126).

(*c*) See *Lane* v. *Cotton*, *supra*, at p. 480; *York* v. *Grindstone*, *supra*.

(*d*) *R.* v. *Rymer* (1877), 2 Q. B. D. 136, C. C. R.

(*e*) *R.* v. *Rymer*, *supra*, *per* KELLY, C.B., at p. 140; but MANISTY, J., at p. 141, was of opinion that "a guest cannot under any circumstances insist on bringing a dog into any room or place in an inn where other guests are."

(*f*) *Fell* v. *Knight* (1841), 8 M. & W. 269 (where the traveller desired to sit up all night and claimed to have a room upstairs for that purpose, the innkeeper offering him one downstairs); *Scrivenor* v. *Reed* (1858), 6 W. R. 603.

(*g*) *Scrivenor* v. *Reed*, *supra*.

(*h*) 1 Starkie, Law of Evidence, 2nd ed., p. 445.

(*i*) *Burgess* v. *Clements* (1815), 4 M. & S. 306, *per* Lord ELLENBOROUGH, C.J., at p. 310.

(*k*) *Dicas* v. *Hides* (1816), 1 Stark. 247.

(*l*) See *Anon.* (1619), 2 Roll. Rep. 79; Bac. Abr., tit. Inns and Innkeepers (C.).

(*m*) *Lane* v. *Cotton*, *supra*, at p. 484; *Gordon* v. *Silber* (1890), 25 Q. B. D. 491; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, C. A., *per* Lord ESHER, M.R., at p. 20; *Browne* v. *Brandt*, [1902] 1 K. B. 696; and see *White's Case* (1558), Dyer, 158 b.

(*n*) *Browne* v. *Brandt*, *supra*.

(*o*) *R.* v. *Rymer*, *supra*.

receive a traveller that he is drunk or behaves improperly (*p*), or that he is not in a fit condition to be in the house (*q*).

But the arrival of a traveller at a late hour (*r*), or upon a Sunday (*r*), or the fact that he wishes to sit up all night (*s*), or his refusal to inform the innkeeper of his name and abode (*t*), is not a sufficient ground for refusal to receive him.

Illness.

Nor does a traveller's illness appear to be a sufficient ground for refusing to receive him, even perhaps, so far as the common law is concerned, if he is suffering from an infectious disease (*a*); but a person who is suffering from a dangerous infectious disorder (*b*), and is without proper lodging and accommodation, may, in certain circumstances and with certain formalities, be removed to a hospital or place for the reception of the sick at the cost of the local authority (*c*), and any person who while suffering from a dangerous infectious disorder wilfully exposes himself without proper precautions against spreading the disorder in (amongst other places) an inn, or, being in charge of any person so suffering, so exposes such sufferer, is liable to a penalty not exceeding £5 (*d*).

Infectious disorder.

Letting infected room.

Any person who knowingly lets for hire any house, room, or part of a house in which any person has been suffering from any dangerous infectious disorder, without having such house, room, or part of a house, and all articles therein liable to retain infection, disinfected to the satisfaction of a legally qualified medical practitioner (*e*) as testified by a certificate signed by him, is liable to a penalty not exceeding £20, and for the purpose of this provision the keeper of an inn is deemed to let for hire part of a house to any person admitted as a guest into such inn (*f*).

(*p*) *R.* v. *Ivens* (1835), 7 C. & P. 213; *Hawthorn* v. *Hammond* (1844), 1 Car. & Kir. 404, *per* PARKE, B., at p. 407; *Thompson* v. *McKenzie*, [1908] 1 K. B. 905, 907.

(*q*) *Pidgeon* v. *Legge* (1857), 21 J. P. 743, *per* BRAMWELL, B., at p. 744. This was a case of a chimney sweep in his working clothes, and POLLOCK, C.B., said: "The view that he was in an unfit state to be in an alehouse was acquiesced in by the jury and adopted by the plaintiff's (the chimney sweep's) counsel." Compare *R.* v. *Sprague* (1899), 63 J. P. 233, where an innkeeper refused to serve a lady in "rational" dress in the coffee room, but offered to serve her in the bar parlour, and it was held at quarter sessions he might do so.

(*r*) *R.* v. *Ivens*, *supra*. As to closing hours of licensed premises, see title INTOXICATING LIQUORS; and compare title FACTORIES AND SHOPS, Vol. XIV., p. 511.

(*s*) *Fell* v. *Knight* (1841), 8 M. & W. 269, *per* ALDERSON, B., at p. 273.

(*t*) *R.* v. *Ivens*, *supra*.

(*a*) See *R.* v. *Luellin* (1701), 12 Mod. Rep. 445.

(*b*) For a definition of "infectious disease" under the Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), see ss. 6, 7 of that Act; and see generally, titles ANIMALS, Vol. I., pp. 419 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 124, 125; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 126; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) See the Medical Act, (21 & 22 Vict. c. 90), s. 34, and the Medical Act, 1886 (49 & 50 Vict. c. 48), s. 27.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 128; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

SECT. 1.
To Receive and Entertain Guest.

SUB-SECT. 2.—*Penalties for Refusal.*

(i.) *Action.*

Penalties for refusal to receive.

640. If an innkeeper refuses without lawful excuse to receive, lodge, or entertain a traveller, an action (*g*) on the case (*h*) will lie against him at the suit of the traveller.

The claim should be against the defendant as a common innkeeper (*i*) without alleging any authority in the plaintiff to go to the inn (*k*), as the action is not an action for breach of contract (*l*).

Similarly an action will lie against an innkeeper for refusing to receive the horse of a traveller (*m*).

(ii.) *Indictment.*

Procedure by indictment.

641. If an innkeeper refuses without lawful excuse to receive, lodge, or entertain a traveller, he is also liable to indictment (*n*); but it is essential that the indictment should allege that the person refused was a traveller (*o*).

Proof of tender of a reasonable sum for the accommodation required will be necessary unless the circumstances are such as to

(*g*) *Parker* v. *Flint* (1698), 12 Mod. Rep. 254; *Bennett* v. *Mellor* (1793), 5 Term Rep. 273, *per* BULLER, J., at p. 275; *Fell* v. *Knight* (1841), 8 M. & W. 269; *Anon.* (1465), Y. B. 5 Edw. 4, fo. 2; *Anon.* (1460), Y. B. 39 Hen. 6, fo. 18, cited Bro. Abr., tit. Action sur le case, pl. 76; *Lane* v. *Cotton* (1701), 12 Mod. Rep. 472, 484; 1 Hawk. P. C. (by Curwood) 714.

(*h*) *Anon.* (1503), Keil. 50; *R.* v. *Collins* (1623), 2 Roll. Rep. 345 (the name of this case is given in 3 Burr. at p. 1501); *Hawthorn* v. *Hammond* (1844), 1 Car. & Kir. 404; *Johnson* v. *Midland Rail. Co.* (1849), 4 Exch. 367, *per* PARKE, B., at p. 373; and see *Parsons* v. *Gingell* (1847), 4 C. B. 545, 555, note (a); *Jackson* v. *Rogers* (1683), 2 Show. 327. It was said by all the judges in *Anon.* (1465), Y. B. 5 Edw. 4, fo. 2, that the remedy was not by action but by complaint to the ruler of the vill. The contrary, however, was said *obiter* in argument in *R.* v. *Chester* (*Bishop*) (1499), Y. B. 14 Hen. 7, fo. 21, at fo. 22. Upon complaint to the ruler of the vill, it was said that the constable would compel the innkeeper to receive the traveller, but it seems doubtful whether a constable has any power to compel an innkeeper except by bringing an indictment against him. See on this subject *Anon.* (1503), Keil. 50, note (a); *Newton* v. *Trigg* (1691), 1 Show. 268, *per* EYRES, J., at p. 268; *Anon.* (1460), Y. B. 39 Hen. 6, fos. 18, 19, cited Bro. Abr., tit. Action sur le case, pl. 76; *Anon.* (1465), Y. B. 5 Edw. 4, fo. 2, cited Bro. Abr., tit. Action sur le case, pl. 92; 1 Hawk. P. C. (by Curwood) 714.

(*i*) *R.* v. *Collins*, *supra*; *Parker* v. *Flint*, *supra*; and an action shall lie against him in default, not by the name of *hospitat*, but of *com' hospitat*. Forms of counts are given in *Fell* v. *Knight*, *supra*; *Hawthorn* v. *Hammond*, *supra*; Bullen and Leake, Precedents of Pleading, 3rd ed., p. 343.

(*k*) *R.* v. *Collins*, *supra*.

(*l*) *Anon.* (1503), Keil. 50; and see *Saunders* v. *Plummer* (1662), O. Bridg. 223.

(*m*) *Saunders* v. *Plummer*, *supra*.

(*n*) *R.* v. *Ivens* (1835), 7 C. & P. 213, where form is set out; *R.* v. *Rymer* (1877), 2 Q. B. D. 136, C. C. R. (indictment at sessions); 1 Hawk. P. C. (by Curwood) 714; and see *R.* v. *Luellin* (1701), 12 Mod. Rep. 445; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 329, 556.

(*o*) *R.* v. *Luellin*, *supra*; and see *R.* v. *Rymer*, *supra*.

show that the innkeeper waived a tender, or circumstances are proved which make a tender unnecessary (*p*).

An innkeeper is also indictable if he take excessive prices (*q*).

SECT. 2.—*In respect of Personal Safety of Guest.*

SUB-SECT. 1.—*Extent of Liability.*

Liability for personal safety of guests.

642. It is the duty of an innkeeper to take reasonable care of the persons of his guests, so that they should not be injured by anything happening to them through his negligence while they are his guests (*r*). But apart from negligence, there is no absolute liability cast upon him to insure the personal safety of his guests as there is with respect to the safety of their goods; so that if a guest is beaten in an inn the innkeeper is not liable, as his duty with regard to safekeeping extends to the goods and chattels, and not to the person of his guest (*s*).

Who is a guest.

A guest for this purpose is one who goes upon business which concerns the innkeeper and upon his invitation, express or implied, and does not include persons who go as mere volunteers, or licensees, or persons in common language called guests, or servants, or persons whose employment is such that danger may be considered to be bargained for (*t*); the distinction being between the case of a visitor, who must take care of himself, and of a customer who, as one of the public, is invited for the purposes of business carried on by the innkeeper (*a*).

Thus a visitor staying at an inn upon the invitation of the innkeeper has no cause of action when injured in opening a door leading out of the inn, which has been left in a dangerous condition (*b*).

(*p*) *Anon.* (1460), Y. B. 39 Hen. 6, fos. 18, 19, cited Bro. Abr., tit. Action sur le case, pl. 76, *per* DANBY, J.; *A.-G.* v. *Capel* (1494), Y. B. 10 Hen. 7, fo. 7, *per* HUSSEY, C.J., at fo. 8; *Pinchon's Case* (1611), 9 Co. Rep. 86 b; *R.* v. *Ivens* (1835), 7 C. & P. 213.

(*q*) *Crisp* v. *Pratt* (1639), Cro. Car. 549; "An innkeeper does not sell by contract, but delivers goods to his guests as they require; and if he takes an excessive price he may be indicted" (*Luton* v. *Bigg* (1691), Skin. 291); Bac. Abr., tit. Inns and Innkeepers (C.), 2; see *Johnson's Case* (1621), Cro. Jac. 610; *Newton* v. *Trigg* (1691), Carth. 149, 150.

(*r*) *Sandys* v. *Florence* (1878), 47 L. J. (Q. B.) 598, *per* LINDLEY, J., at p. 600; *Indermaur* v. *Dames* (1866), 35 L. J. (C. P.) 184, *per* WILLES, J., at p. 189. As to negligence generally, see title NEGLIGENCE.

(*s*) *Calye's Case* (1584), 8 Co. Rep. 32 a; *Sandys* v. *Florence*, *supra*, *per* LINDLEY, J., at p. 600; and compare *Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379, 382, 386, Ex. Ch.

(*t*) *Indermaur* v. *Dames*, *supra*, at p. 190.

(*a*) *Indermaur* v. *Dames*, *supra*, at p. 189; *Southcote* v. *Stanley* (1856), 1 H. & N. 247; *Collis* v. *Selden* (1868), L. R. 3 C. P. 495 (case of a chandelier falling); *Sandys* v. *Florence*, *supra* (case of a ceiling falling); *Duckes* v. *Strong* (1902), May, C. A. (unreported) (case of a chimney falling and injuring guest).

(*b*) *Southcote* v. *Stanley*, *supra*, as reported in 25 L. J. (EX.) 339. This seems to be the main point of the decision in this case, POLLOCK, C.B., saying, at p. 340: "All are sailing in one boat and in effect members of one family." But ALDERSON, B., said, at p. 340: "As in this case it is consistent that the actual negligence was the negligence of a servant, the master is not responsible. But I am not prepared to say that the person actually causing the negligence,

SECT. 2. In respect of Personal Safety of Guest.

The general duty of an innkeeper to take proper care for the safety of his guests does not extend to every room in his house, at all hours of the day or night, irrespective of the question whether any such guests may have a right, or some reasonable cause, to be there, but is limited to those places into which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so (*c*).

Limits of liability.

An innkeeper would be liable for injury done to a guest through his swallowing some foreign substance in food served up to him at the inn through the negligence of the innkeeper's servants (*d*), or through the food being infected with the germs of disease (*e*).

SUB-SECT. 2.—*Remedy against Innkeeper.*

Remedy of guest.

643. The remedy of a guest against an innkeeper who has not fulfilled his duty in respect of care for the guest's personal safety is by action (*f*).

SECT. 3.—*In respect of Guest's Property.*

SUB-SECT. 1.—*Extent of Liability.*

(i.) *At Common Law.*

Liability for guest's goods.

644. By the common law or custom of the realm (*g*) innkeepers who keep common inns to entertain persons passing by the places where such inns are, and lodging in the same, are bound to keep the goods of such persons deposited therein without subtraction night and day, so that by the default of the innkeepers or their servants no damage may come in any manner to the guests (*h*).

This liability does not depend upon bailment or pledge or contract, for the duties, liabilities and rights of innkeepers with respect

whether the master or servant, would not be liable"; and BRAMWELL, B., said, at p. 340: "A person lawfully in a house has a right to expect that there is no pitfall, as it were in his way" [instancing a steel trap], and then seemingly held that the distinction is between an "act of commission" and an "act of omission."

(*c*) *Walker* v. *Midland Rail. Co.* (1886), 55 L. T. 489, H. L. (case under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), known as Lord CAMPBELL'S Act).

(*d*) See *Brett* v. *Holborn Restaurant Co.* (1887), 3 T. L. R. 309 (case of a needle and thread).

(*e*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14; *Bigge* v. *Parkinson* (1862), 7 H. & N. 955, Ex. Ch.; *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608, C. A. See titles FOOD AND DRUGS, Vol. XV., p. 4; SALE OF GOODS.

(*f*) See title NEGLIGENCE.

(*g*) Fitz. Nat. Brev. 94 b (9th ed., Hale's Commentary); *Calye's Case* (1584), 8 Co. Rep. 32 a; 1 Smith, L. C., 11th ed., p. 119; *Reniger* v. *Fogossa* (1552), Plowd. 1, 9, Ex. Ch.; Resolution of Judges (1624), Hut. 99; *Kirkman* v. *Shawcross* (1794), 6 Term Rep. 14, 17; *Kent* v. *Shuckard* (1831), 2 B. & Ad. 803, *per* Lord TENTERDEN, C.J., at p. 804; *Dansey* v. *Richardson* (1854), 3 E. & B. 144; *Squire* v. *Wheeler* (1867), 16 L. T. 93, *per* BYLES, J., at p. 94; *Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501, C. A., *per* Lord ESHER, M.R., at pp. 503—505; and see *Anon.* (1565), Moore (K. B.), 78; *Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379, Ex. Ch.

(*h*) Fitz. Nat. Brev. 94 b (9th ed., Hale's Commentary, noting *Daleford* v. *An Innkeeper* (1400), Y. B., 2 Hen. 4, fo. 7; *Anon.* (1409), 11 Hen. 4, fo. 45); *Calye's Case supra*; *Kirkman* v. *Shawcross, supra*; see *Anon.* (1586), Godb. 42; *Herbert* v. *Lane* (1653), Sty. 370.

SECT. 3. In respect of Guest's Property.

to goods brought to inns by guests are founded upon the custom of the realm with regard to innkeepers, and depend upon that and upon that alone; they do not come under any other head of law (*i*).

An innkeeper is, therefore, chargeable to his guest for the restoring of that which is lost (*j*) or stolen (*k*) within the inn (*l*). In other words, he is an insurer of his guest's goods (*m*), and it does not signify, as far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest; he is liable for keeping them safely unless they are lost by the fault of the traveller himself (*n*).

Limits of liability.

The innkeeper's obligation extends to all movables, even such as at common law were not the subject of felony, for example, charters and evidences concerning freehold or inheritance, or obligations or other deeds or specialties, being things in action (*o*), and it extends also to money (*p*).

Absence of negligence on the part of the innkeeper or of his servants (*q*), or the fact that he was sick and insane at the time when his guest's goods were lost, does not affect his liability (*r*).

Nor can an innkeeper get rid of his responsibility by telling his guest that there are persons in the house whose character he does not know and that the guest is to put his goods in his room, of which the key is given to him, at his peril, for the innkeeper cannot take any charge of them (*s*); nor by telling a guest that he will not be responsible for any goods that are not put under lock and key (*t*).

But if a guest, after being warned by an innkeeper to put his goods in a certain room in the inn provided with lock and key, and that, on this being done, the innkeeper would be liable but not otherwise, leaves the goods loose in an outer yard of the inn and from there they are stolen, the innkeeper is not liable (*a*).

(*i*) *Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501, C. A., *per* Lord ESHER, M.R., at pp. 503, 504.

(*j*) *Reniger* v. *Fogossa* (1552), Plowd. 1, 9, Ex. Ch.; Resolution of Judges (1624), Hut. 99; *Squire* v. *Wheeler* (1867), 16 L. T. 93.

(*k*) *Reniger* v. *Fogossa, supra; Anon.* (1565), Moore (K. B.), 78; *Robins & Co.* v. *Gray, supra.*

(*l*) *Reniger* v. *Fogossa, supra; Calye's Case* (1584), 8 Co. Rep. 32 a; Resolution of Judges (1624), Hut. 99.

(*m*) *Squire* v. *Wheeler* (1867), 16 L. T. 93; *Bather* v. *Day* (1863), 32 L. J. (EX.) 171, *per* POLLOCK, C.B., at p. 173.

(*n*) *Robins & Co.* v. *Gray, supra, per* Lord ESHER, M.R., at p. 504.

(*o*) *Calye's Case, supra; Kent* v. *Shuckard* (1831), 2 B. & Ad. 803, *per* TAUNTON, J., at pp. 804, 805.

(*p*) *Kent* v. *Shuckard, supra;* see *Beedle* v. *Morris* (1609), Cro. Jac. 224.

(*q*) *W.* v. *T.* (1368), Y. B. 42 Edw. 3, fo. 11; *Bennett* v. *Mellor* (1793), 5 Term Rep. 273, *per* BULLER, J., at p. 276; *Morgan* v. *Ravey* (1861), 6 H. & N. 265; *Squire* v. *Wheeler, supra; Cunningham* v. *Philp* (1896), 12 T. L. R. 352; *Butler & Co., Ltd.* v. *Quilter* (1900), 17 T. L. R. 159; and see *Broadwater* v. *Blot* (1817), Holt (N. P.), 547.

(*r*) *Cross* v. *Andrews* (1598), Cro. Eliz. 622.

(*s*) *Anon.* (1565), Moore (K. B.), 78.

(*t*) *Harland's Case* (1641), Clay. 97.

(*a*) *Sanders* v. *Spencer* (1567), 3 Dyer, 266 b. In that case (an action against

SECT. 3. In respect of Guest's Property.

An agreement between an innkeeper and a guest that the innkeeper shall be responsible only for goods delivered to the innkeeper for safe custody is valid (*b*); and possibly an innkeeper may insist that if he is to be responsible for the goods of a guest, they must be placed in the guest's bedroom or some other place selected by the innkeeper, but to make this a defence the innkeeper must have distinctly informed the guest (*c*).

Liability confined to innkeepers.

645. This liability for the goods and chattels of a guest is confined to innkeepers properly so called (*d*). It does not extend to the keeper of a mere restaurant (*e*); but a lodging-house keeper (*f*), or boarding-house keeper (*g*), or a person who takes in someone as a lodger (*h*) is liable for the loss of the lodger's or boarder's goods stolen by a stranger (*i*), if there is negligence upon the part of the keeper of the lodging-house or boarding-house (*k*), or on the part of a servant delegated by the keeper of the house for the performance of some part of the duty of taking reasonable care of the lodger's or boarder's goods.

Liability for horse of guest.

646. An innkeeper's liability for the goods of his guest extends to the horse of his guest (*l*), and the innkeeper is liable for damage to a guest's horse, however caused (*l*).

an innkeeper for a piece of cloth stolen from the inn) the defence that the defendant had warned the plaintiff to put his goods in a certain room in the inn provided with a lock and key, and that if he did so the defendant was willing to be liable for them, but not otherwise; but the plaintiff in spite of such warning had left them loose in an outer court, where they were stolen, was, on demurrer, held good. The *ratio decidendi* of this case is not clear. It may be that an outer yard was not considered *infra hospitium* for the storage of goods that were not packed up, or it may be that the facts were considered to prove that the loss was due to the negligence of the guest.

(*b*) *Brand* v. *Glasse* (1584), Moore (K. B.), 158. But it is difficult to reconcile this decision with *Harland's Case* (1641), Clay. 97, unless there is some consideration for the agreement apart from acceptance of the guest as a guest at the inn.

(*c*) See *Richmond* v. *Smith* (1828), 8 B. & C. 9, *per* Lord TENTERDEN, C.J., at p. 10. But this is only a *dictum*, and is not easy to understand on principle. In *Wyld* v. *Pickford* (1841), 8 M. & W. 443, it was held that a carrier could limit his liability by special contract on the ground that in that case the sender was not ready to pay the price for carriage beforehand.

(*d*) *Calye's Case* (1584), 8 Co. Rep. 32 a. And see *Scarborough* v. *Cosgrove*, [1905] 2 K. B. 805, 814, C. A.

(*e*) See *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92. A restaurant keeper may become liable as bailee for the overcoat of a guest lost through the negligence of the restaurant keeper or his servants (*ibid.*).

(*f*) *Scarborough* v. *Cosgrove*, *supra*.

(*g*) *Dansey* v. *Richardson* (1854), 3 E. & B. 144; *Scarborough* v. *Cosgrove*, *supra*, at p. 813.

(*h*) *Calye's Case*, *supra*; *Barnolby* v. *Wilkins* (1402), Dyer, 158 b in margin.

(*i*) *Calye's Case*, *supra*; *Scarborough* v. *Cosgrove*, *supra*.

(*k*) *Dansey* v *Richardson*, *supra*; *Scarborough* v. *Cosgrove*, *supra*. In the last-cited case a new trial was granted by the Court of Appeal on the ground that there was evidence to go to the jury of want of reasonable care of the guest's goods by the boarding-house keeper or his servants, to which the loss was attributable. See titles BAILMENT, Vol. I., pp. 523 *et seq.*; LANDLORD AND TENANT; NEGLIGENCE.

(*l*) *Stanyon* v. *Davis* (1704), 6 Mod. Rep. 223.

SECT. 3. In respect of Guest's Property.

An inkeeper's liability with respect to the safe keeping of the horse of a guest does not extend to the keeper of a livery stable (*m*).

A person who leaves his horse at an inn although he himself does not go into the inn is for this purpose a guest (*n*). It is, however, otherwise if he merely leaves a trunk or other dead thing (*n*); in such case the innkeeper would be liable only as a bailee (*o*).

Liability for goods.

647. The goods need not be in the special keeping of the innkeeper in order to render him liable. It is sufficient that they are in the inn (*p*). For the innkeeper is bound to answer for himself and for his family with respect to the chambers and stables, for they are within the inn (*q*). So, also, he is bound to answer for goods in the commercial room (*r*).

Where guest's property not in inn.

If, therefore, a man comes to an inn and delivers his horse to the ostler and requires him to put him to pasture, which is accordingly done, and the horse is stolen out of the pasture, the innkeeper is not liable, because the horse was, at the request of the owner, not within the inn (*s*). But if the guest does not require the horse put out to pasture, and the innkeeper, of his own accord, puts the horse to pasture, the innkeeper is liable for the loss (*a*).

If an innkeeper receives a guest into the inn, puts the guest's horse into the stable, and places the guest's gig outside the inn yard, he being accustomed to place carriages of guests there, the innkeeper is liable for the loss of the gig, if it is stolen, because he by his conduct treats the place where he put the gig as part of the inn (*b*). The innkeeper is liable even if the stables used with the inn are quite detached from the inn and at some distance (*c*).

An innkeeper will be none the less liable for injury happening to

(*m*) *Barnard* v. *How* (1824), 1 C. & P. 366. But the keeper of a livery stable may be liable for the wrongful act of his servant, whereby a guest's horse is injured (*Bather* v. *Day* (1863), 32 L. J. (EX.) 171, *per* MARTIN, B., at p. 173), or lost (*Barnard* v. *How*, *supra*; compare title BAILMENT, Vol. I., p. 538).

(*n*) *York* v. *Grindstone* (1704), 1 Salk. 388; *Drope* v. *Thaire* (1626), Lat. 126, *per* DODERIDGE, J., at p. 127.

(*o*) *Bennett* v. *Mellor* (1793), 5 Term Rep. 273. In one case a gratuitous bailee, who was the keeper of a public-house, put the money entrusted to his care into the till with his own. The tap-room in which the till was, was open to the public on Sundays, and the money was stolen on a Sunday. It was held that there was evidence of gross negligence which rendered the bailee liable, and that gross negligence was not necessarily negatived by the fact that he put the money with his own (*Doorman* v. *Jenkins* (1834), 2 Ad. & El. 256). See further, title BAILMENT, VOL. I., pp. 523 *et seq.*

(*p*) *Bennett* v. *Mellor*, *supra*; *Calye's Case* (1584), 8 Co. Rep. 32 a.

(*q*) *Calye's Case*, *supra*; citing *De N.* v. *De S.* (1368), 42 Lib. Ass. pl. 17, *per* KNIVET, C.J.

(*r*) *Armistead* v. *Wilde* (1851), 17 Q. B, 261.

(*s*) *Calye's Case*, *supra*.

(*a*) *Calye's Case*, *supra*; *Saunders* v. *Plummer* (1662), O. Bridg. 223.

(*b*) *Jones* v. *Tyler* (1834), 1 Ad. & El. 522 (in this case the open street).

(*c*) See *Bather* v. *Day*, *supra*.

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a horse in the charge of the ostler because of a private arrangement between innkeeper and ostler by which the ostler takes the profits of the stables (*d*).

Unexplained loss.

648. The innkeeper is liable although the cause of the injury or loss is unexplained (*e*). But in order to render him liable the person whose goods and chattels are lost must have been received as a guest at the inn (*f*). It is not, however, necessary that a person should be a traveller in order to make him a guest at an inn (*g*). He may be a guest although he has stayed more than three days (*h*), and has stayed several days (*i*), or even several months, provided nothing occurs to alter the relation of the parties (*k*). But it seems that a person who comes to an inn and makes an agreement for boarding there for a considerable term such as three months may constitute himself a boarder and not be a guest (*l*).

Guest.

649. A traveller whom the innkeeper refuses to receive because the inn is full, but who then, without the assent of the innkeeper or his servants, obtains permission from a guest to share his bedroom in the inn, is not a guest (*m*). Nor does a traveller become a guest if he goes to an inn intending to lodge there, but, altering his intention, leaves without even obtaining refreshment there (*n*).

(*d*) *Bather* v. *Day* (1863), 32 L. J. (EX.) 171. In this case a guest left a mare and gig at an inn saying he would not return for several days. He did not in fact return for a fortnight.

(*e*) *Morgan* v. *Ravey* (1861), 6 H. & N. 265, disapproving *Dawson* v. *Chamney* (1843), 5 Q. B. 164, unless, as explained in *Morgan* v. *Ravey*, *supra*, the jury did not believe that the injury to the horse in *Dawson* v. *Chamney*, *supra*, was received in the stable at all; and compare *Phipps* v. *New Claridge's Hotel, Ltd.* (1905), 22 T. L. R. 49.

(*f*) *Calye's Case* (1584), 8 Co. Rep. 32 a; *Lane* v. *Cotton* (1701), 12 Mod. Rep. 472, 480; *Bennett* v. *Mellor* (1793), 5 Term Rep. 273; *Strauss* v. *County Hotel Co.* (1883), 12 Q. B. D. 27; *Orchard* v. *Bush & Co.*, [1898] 2 Q. B. 284; *Wright* v. *Anderton*, [1909] 1 K. B. 209. But as to a horse, see *York* v. *Grindstone* (1704), 1 Salk. 388; *Drope* v. *Thaire* (1626), Lat. 126.

(*g*) *Drope* v. *Thaire*, *supra*, *per* DODERIDGE, J., at p. 127. "As to the allegation that he is travelling, that is nothing; perhaps he is at the end of his journey"; S. C., *sub nom. Drope and Thayre's Case*, Dyer, 158 b, Vaillant's ed., in margin. But in *Grimston* v. *An Innkeeper* (1627), Het. 49, upon action for goods stolen judgment was given for the defendant, even after verdict for the plaintiff, on the ground that the declaration had not alleged that the plaintiff was a traveller.

(*h*) *Harland's Case* (1641), Clay. 97, overruling in this particular *Calye's Case*, *supra*; and *Gulielm's Case* (1625), Lat. 88.

(*i*) *Harland's Case*, *supra* (in this case fourteen days).

(*k*) *Allen* v. *Smith* (1862), 12 C. B. (N. S.) 638 (in this case seven months).

(*l*) *Drope* v. *Thaire*, *supra*. In *Parker* v. *Flint* (1698), Holt (K. B.), 366, HOLT, C.J., said: "If one comes to an inn and makes a contract for lodging for a set time and does not eat or drink there, he is not guest but a lodger; and as such is not under the innkeeper's protection. But if he eats and drinks there it is otherwise; or if he pays for his diet there, though he does not take it there." See *Grimston* v. *An Innkeeper*, *supra*.

(*m*) *Birde* v. *Bird* (1558), Benl. 60; S. C., *sub nom. Bird* v. *Bird*, 1 And. 29; S. C. *sub nom. White's Case* (1558), Dyer, 158; Doctor and Student, 238; Fitz. Nat. Brev. 94 b.

(*n*) *Strauss* v. *County Hotel Co.* (1883), 12 Q. B. D. 27. In this case the

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A person who is lodging at the inn merely as a friend, at the request of the innkeeper, is not for this purpose a guest (*o*).

It is not necessary to the character of guest that the guest should be lodging in the inn (*p*). Thus a person who merely gets a meal in the dining-room of an hotel may be a guest, and, if sleeping accommodation is provided at the hotel, the hotel-keeper may be an innkeeper (*q*).

Guest need not lodge at inn.

Nor is it necessary to constitute a person a guest that he should actually be in the inn when the goods are stolen (*r*). If, however, he leaves the inn for several days, he is not during the period of his absence a guest at the inn, even though some of his goods are left by him with the innkeeper during his absence (*s*).

A person is not any the less a guest because by arrangement with the innkeeper some other person pays for the accommodation and refreshment provided (*a*).

Inn carried on by manager.

650. In the case of an inn, of which a company is the proprietor, and which it carries on by means of a manager, the inn is kept by the company, and not by the manager, even though the licence for the sale of intoxicating liquors is in the name of the manager (*b*).

Innkeeper *primâ facie* liable for loss.

651. If goods be lost or stolen from or damaged in an inn, the innkeeper is *primâ facie* liable (*c*), but he may succeed in excusing himself from liability in the following cases :—

Loss arising from negligence of guest himself.

(1) An innkeeper is not liable for loss caused by the misconduct or negligence of the guest who suffers the loss (*d*). Thus an innkeeper is not liable when the servant or companion of the guest steals or carries away the goods (*e*), or where the action of the

intending guest went to the coffee room to dine, but not finding what he wanted went to the station refreshment room, which was under the same management as the hotel, and connected with it by a covered passage. On his way he met the hotel porter, to whom he had already entrusted his luggage, and told him to lock it up until he was ready to start by train for another station. The luggage was lost.

(*o*) *Calye's Case* (1584), 8 Co. Rep. 32 a.

(*p*) *Bennett* v. *Mellor* (1793), 5 Term Rep. 273 (case of a man sitting down in order to get something to drink); *Orchard* v. *Bush & Co.*, [1898] 2 Q. B. 284; *Wright* v. *Anderton*, [1909] 1 K. B. 209 (case of a footballer changing his clothes and intending subsequently to take tea).

(*q*) *Orchard* v. *Bush & Co.*, *supra*.

(*r*) *W.* v. *T.* (1368), Y. B. 42 Edw. 3, fo. 11 (gone out on business); *Sand's (Sir E.) Case* (1603), cited Moore (K. B.), 877; *Biddle* v. *Morice* (1609), Dyer, 158 b, Vaillant's ed., in margin (gone out saying he will return at night).

(*s*) *Gelley* v. *Clerk* (1607), Cro. Jac. 188.

(*a*) *Wright* v. *Anderton*, *supra*.

(*b*) *Dixon* v. *Birch* (1873), L. R. 8 Exch. 135.

(*c*) *Burgess* v. *Clements* (1815), 4 M. & S. 306; and see title EVIDENCE, Vol. XIII., p. 434.

(*d*) *Calye's Case*, *supra*; 1 Smith, L. C., 11th ed., p. 119; *Burgess* v. *Clements*, *supra*; *Armistead* v. *Wilde* (1851), 17 Q. B. 261; *Filipowski* v. *Merryweather* (1860), 2 F. & F. 285.

(*e*) *Calye's Case*, *supra*; *Burgess* v. *Clements*, *supra*.

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guest has been so negligent as to induce or make likely the loss (*f*).

There is no rule of law that for a guest to leave the door of his bedroom unlocked and unbolted is negligence (*g*). Each case must depend upon its own circumstances (*h*).

In order to relieve the innkeeper from liability it is not, however, necessary that the negligence of the guest should be gross negligence in the strict legal meaning of that phrase, that is, negligence excluding the loosest degree of care (*i*). But an innkeeper is not relieved from responsibility by the negligence of the guest, unless such negligence occasions the loss in the sense that the loss would not have occurred if the guest had used the ordinary care of a prudent man under the circumstances (*k*).

Assumption by guest of exclusive custody.

(2) An innkeeper is not liable in a case where the guest, by way of excessive caution and security, assumes the exclusive charge of a room or of goods (*l*), so as to show an intention to relieve the innkeeper from all responsibility. Whether in a particular case the guest has so conducted himself as to take upon

(*f*) The ostentatious display of money and then the leaving of it in an ill-secured place in the presence of several persons is evidence of negligence (*Armistead* v. *Wilde* (1851), 17 Q. B. 261; see also *Sanders* v. *Spencer* (1567), Dyer, 266 b, cited in note (*a*), p. 315, *ante*). But there is no rule of the law that a guest is guilty of negligence who locks his door, but does not draw the night-bolt, even though a notice is hung up in the bedroom requesting visitors to use the night-bolt, and to leave money, jewellery, or articles of value at the bar (*Filipowski* v. *Merryweather* (1860), 2 F. & F. 285).

(*g*) *Mitchell* v. *Woods* (1867), 16 L. T. 676. As to negligence generally, see title NEGLIGENCE.

(*h*) *Herbert* v. *Markwell* (1881), 45 L. T. 649; affirmed, [1882] W. N. 112, C. A.; *Oppenheim* v. *White Lion Hotel Co.* (1871), L. R. 6 C. P. 515.

(*i*) *Cashill* v. *Wright* (1856), 6 E. & B. 891. In this case it was held that there was evidence of negligence to be left to the jury where a guest after showing money in the commercial room went to bed and left money in his trouser-pocket in the bedroom and left the bedroom door ajar. There is also evidence of negligence causing the loss where a guest who has previously pulled a money bag out of his pocket in the commercial room, goes to bed after shutting but without locking the bedroom door, and leaves the bag in the bedroom in a place easily discoverable, the thief entering the bedroom through the door during the night (*Oppenheim* v. *White Lion Hotel Co.*, *supra*); or where a guest leaves in his bedroom in the morning a considerable sum of money easily discoverable, and does not return to the bedroom until the evening (when the money is gone), especially if there is a notice in the room announcing that the innkeeper is prepared to take charge of any valuables (*Jones* v. *Jackson* (1873), 29 L. T. 399). But there is no evidence of negligence on the part of a guest where all that is proved is that his luggage is lost from the hall, and that the proper place in which to put such luggage was the commercial room, where there were shelves for the purpose, and that the guest was informed of this, and that he desired it to remain in the hall (*Candy* v. *Spencer* (1862), 3 F. & F. 306); or where a guest finds signs suggestive of a theft, but does not at once look at her jewel box or discover that it has been broken open, and does not inform the innkeeper of the signs of a theft (*Huntly* (*Marchioness*) v. *Bedford Hotel Co., Ltd.* (1891), 56 J. P. 53, C. A.).

(*k*) *Cashill* v. *Wright*, *supra*.

(*l*) *Farnworth* v. *Packwood* (1816), Holt (N. P.), 209; *Richmond* v. *Smith* (1828), 8 B. & C. 9.

himself exclusive care, control, and cusdody to the exclusion of the innkeeper and other persons is a question of fact (*m*).

(3) An innkeeper is not liable where the loss arises from act of God (*n*) or the King's enemies (*o*), that is alien enemies (*p*).

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Loss arising from act of God or King's enemies.

(ii.) *By Statute.*

Statutory liability to make loss good.

652. No innkeeper is liable to make good to a guest any loss of, or injury to, goods or property brought to his inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage) to a greater amount than the sum of £30, unless :

(1) The goods or property have been stolen, lost, or injured through the wilful (*q*) act, default, or neglect of such innkeeper or his servant; or

(2) The goods or property have been deposited expressly for safe custody with the innkepeer, provided that in the case of such deposit the innkeeper may require, as a condition of his liability, such goods or property to be deposited in a box or other receptacle, fastened and sealed by the person depositing the same (*r*).

The burden of proving that the loss or injury occurred through the wilful act, default, or neglect of the innkeeper or his servant lies upon the guest (*s*).

Statutory notice to be posted up.

653. Every innkeeper must cause at least one copy of the first section of the Innkeepers' Liability Act, 1863 (*t*), printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and his liability is limited in respect only of such goods or property as are brought to his inn while such copy is so exhibited (*u*).

The due exhibition of this copy is a condition precedent to the limitation of the innkeeper's liability (*v*) ; and if the notice exhibited in the inn is unintentionally misprinted by the omission of the word "act," it does not comply with the statute and the innkeeper's liability is not limited (*a*).

(*m*) *Farnworth* v. *Packwood* (1816), Holt (N. P.), 209; *Richmond* v. *Smith* (1828), 8 B. & C. 9. In the latter case it was said by Lord TENTERDEN, C.J., at p. 10, that the mere fact that a commercial traveller who came into an inn as a guest chose to have his luggage put in the commercial room, although it was the habit of the servants of the inn to put the luggage of guests in the bedrooms, was no evidence that the guest intended to take exclusive control of his luggage.

(*n*) *Dale* v. *Hall* (1750), 1 Wils. 281 (as to common carrier) ; *Morgan* v. *Ravey* (1861), 6 H. & N. 265 ; compare titles BAILMENT, Vol. I., p. 533 ; CARRIERS, Vol. IV., p. 8. For the meaning of act of God, see *Nugent* v. *Smith* (1876), 1 C. P. D. 423, C. A., *per* COCKBURN, C.J., at p. 435 ; *Siordet* v. *Hall* (1828), 4 Bing. 607 ; *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, C. A.

(*o*) *Reniger* v. *Fogossa* (1552), Plowd. 1, 9, Ex. Ch. ; *Dale* v. *Hall*, *supra* (as to common carrier) ; *Morgan* v. *Ravey*, *supra*.

(*p*) See *Marshalsea's* (*Master*) *Case* (1455), Y. B. 33 Hen. 6, fo. 1, pl. 3.

(*q*) The word "wilful" applies only to the word "act" and not to the words "default" or "neglect" (*Squire* v. *Wheeler* (1867), 16 L. T. 93).

(*r*) Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41), s. 1.

(*s*) *Whitehouse* v. *Pickett* (*R. & W.*), [1908] A. C. 357.

(*t*) 26 & 27 Vict. c. 41.

(*u*) *Ibid.*, s. 3.

(*v*) *Hodgson* v. *Ford & Sons* (1892), 8 T. L. R. 722, C. A.

(*a*) *Spice* v. *Bacon* (1877), 2 Ex. D. 463, C. A. Because the notice does not

SECT. 3. In respect of Guest's Property.

Goods will only have been deposited expressly for safe custody if the guest informs the innkeeper in a reasonable and intelligible manner that the deposit is for safe custody (*b*). The mere causing a bag of valuable, but undeclared, contents to be placed in the office of an hotel, even though the guest had been in the habit of doing the same thing on many former occasions, is not sufficient to bring to the innkeeper's notice that the bag is deposited for safe custody, so as to make the deposit one expressly for safe custody (*c*).

Deposit of goods for safe custody.

654. The "boots" of an hotel has no implied authority to receive goods expressly for safe custody (*d*).

A notice posted in the guest's bedroom stating that articles of value, if not kept under lock, should be deposited with the manager, is not evidence of a special contract with the guest that the innkeeper will be liable to a greater amount than £30 for articles of value which are lost or stolen if they are kept there by the guest under lock (*e*).

If an innkeeper refuses to receive for safe custody any goods or property of his guest, or if such guest is, through any default of the innkeeper, unable to deposit such goods or property, the innkeeper is not entitled to the benefit of the Innkeepers' Liability Act, 1863 (*f*), in respect of such goods or property (*g*).

SUB-SECT. 2.—*Remedy against Innkeeper.*

Remedy against innkeeper.

655. The remedy against an innkeeper for loss of or damage to the goods of a guest is by action (*h*).

There never was any need to describe the defendant upon the writ as a common innkeeper, the word "innkeeper" being sufficient and meaning common innkeeper, although it was proper in the declaration to allege that the defendant kept a common inn (*i*); but after verdict, at any rate, the word "inn" without the word "common" was sufficient (*k*), and for purposes of pleading the word "inn" would now, doubtless, be understood as meaning common inn.

If the goods of his master are lost or stolen at the inn where a

admit the continuance of the common law liability where the loss occurs through the wilful act of a servant of the innkeeper; but a mere verbal inaccuracy, immaterial to the sense, would not prevent the intended copy from being a copy within the Act.

(*b*) *Moss* v. *Russell* (1884), 1 T. L. R. 13, C. A.; *Whitehouse* v. *Pickett* (*R. & W.*), [1908] A. C. 357; *O'Connor* v. *Grand International Hotel Co.*, [1898] 2 I. R. 92.

(*c*) *Whitehouse* v. *Pickett* (*R. & W.*), *supra*, Lord COLLINS dissenting.

(*d*) *Moss* v. *Russell*, *supra*.

(*e*) *Huntly* (*Marchioness*) v. *Bedford Hotel Co., Ltd.* (1891), 56 J. P. 53, C. A.

(*f*) 26 & 27 Vict. c. 41.

(*g*) *Ibid.*, s. 2.

(*h*) The action is one on the case (Fitz. Nat. Brev. 94 b (9th ed., Hale's Commentary, noting *Anon.* (1465), Y. B. 5 Edw. 4, fo. 2; —— v. *Horslow* (1443), Y. B., 22 Hen. 6, fo. 21; *Basse's Case* (1444), Y. B., 22 Hen. 6, fo. 38; *Gordon* v. *Silber* (1890), 25 Q. B. D. 491). Early examples of such actions may be found in *Anon.* (1576), Godb. 42; *Herbert* v. *Lane* (1653), Sty. 370; *Mason* v. *Grafton* (1618), Hob. 245.

(*i*) *Calye's Case* (1584), 8 Co. Rep. 32 a.

(*k*) *Mason* v. *Grafton*, *supra*; but see *Parker* v. *Flint* (1698), 12 Mod. Rep. 254.

servant, unaccompanied by his master, is a guest, the action may be brought by the master (*l*). SECT. 3. In respect of Guest's Property.

SECT. 4.—*In respect of Guest's Debt.*

656. Apart from an antecedent promise by an innkeeper to pay for a debt incurred by his guest, an innkeeper is not responsible therefor if the guest departs leaving the debt unpaid; but such an antecedent promise might be inferred if the innkeeper has been in the habit of discharging bills left unpaid by guests (*m*). Liability for guest's debt.

SECT. 5.—*In respect of Injury to Cattle or Sheep by Guest's Dog.*

657. An innkeeper may become liable for injury done to sheep or cattle by a dog belonging to a guest and living with its master at the inn (*n*). Liability for injury by guest's dog.

Part III.—Remedies of Innkeepers.

SECT. 1.—*Action.*

658. An innkeeper can bring an action against his guest for the price of whatever accommodation and supplies the guest has received from him (*o*), or he may sue anyone who has promised him to pay for the guest so far as such promise extends (*p*). Action against guests.

Several persons dining together may be jointly liable (*q*), or there may be facts which show that there is no joint liability, and that they are severally liable each for his own share (*r*).

SECT. 2.—*Lien.*

659. An innkeeper may detain, that is he has a lien (*s*) upon, the horse of a guest until its food is paid for (*t*). He has also a lien Innkeeper's lien.

(*l*) *Windham* v. *Mead* (1589), 4 Leon. 96; *Beedle* v. *Morris* (1609), Cro. Jac. 224; *Candy* v. *Spencer* (1862), 3 F. & F. 306. See title MASTER AND SERVANT.

(*m*) *Callard* v. *White* (1816), 1 Stark. 171 (a case of laundry work left unpaid for).

(*n*) *Gardner* v. *Hart* (1896), 12 T. L. R. 347; see title ANIMALS, Vol. I., pp. 394, 397.

(*o*) *Watbroke* v. *Griffith* (1609), Moore (K. B.), 876; *Pinchon's Case* (1611), 9 Co. Rep. 86 b: "If a victualler or common innkeeper bringeth an action for the victuals delivered to his guest, the guest may wage his law; for a victualler or innkeeper is not compellable to deliver victuals till he is paid for them in hand."

(*p*) *Anon.* (1619), 2 Roll. Rep. 79.

(*q*) *Forster* v. *Taylor* (1811), 3 Camp. 49.

(*r*) *Brown* v. *Doyle* (1788), 3 Camp. 51, n.

(*s*) As to lien generally, see title LIEN.

(*t*) *Anon.* (1465), Y. B. 5 Edw. 4, fo. 2, *per* HAYDON; 2 Roll. Abr. 85; *Watbroke* v. *Griffith*, *supra*; *Newton* v. *Trigg* (1691), 1 Show. 268; *Scarfe* v. *Morgan* (1838), 4 M. & W. 270; *Chapman* v. *Allen* (1632), Cro. Car. 271; *Chase* v. *Westmore* (1816), 5 M. & S. 180; *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A., *per* COTTON, L.J., at p. 493. This lien is strictly confined to innkeepers, and does not extend to livery stable keepers (*Judson* v. *Etheridge* (1833), 1 Cr. & M. 743; *Orchard* v. *Rackstraw* (1850), 9 C. B. 698).

SECT. 2. Lien.

on a carriage for its standing (*u*), and on the other goods which a guest brings to the inn (*a*), including carriages and harness (*b*).

But he is not entitled to detain the guest himself or to take clothes from his person (*c*).

Power to feed horse subject to lien.

660. As far as a horse is concerned, the innkeeper is bound to feed it (*d*), and even if the guest, at a time when the innkeeper has a lien on a horse, directs the innkeeper not to give it any more food, saying that he will not be responsible for it, the innkeeper is entitled to continue to feed the horse and to charge the guest with the food (*e*). The lien exists equally whether or not there is an agreement for a fixed price at which the horse is to be fed (*f*).

Extent of lien.

661. Apart from any special circumstances, the undertaking by the guest to the innkeeper is one undertaking to pay for the things that are supplied to him while he is a guest, and one lien exists as to all that the guest brings with him, so that, for example, the lien exists upon a horse or carriage for the price of the guest's personal food and lodging (*g*).

Goods not the property of the guest.

662. The innkeeper's lien extends to all the goods which the guest brings with him (*h*), even though they do not in fact belong to the guest (*i*), and are brought without the knowledge of the owner (*k*), or have even been stolen (*l*), or otherwise wrongfully obtained, provided that the innkeeper was ignorant of that fact when he received them (*m*), and the innkeeper can assert his lien against the true owner just as well as against the guest (*n*).

Nor is the innkeeper's lien confined to such goods as he is bound as an innkeeper to receive; it extends to all goods brought by a

(*u*) *Turrill* v. *Crawley* (1849), 13 Q. B. 197.

(*a*) *Sunbolf* v. *Alford* (1838), 3 M. & W. 248.

(*b*) *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A., *per* COTTON, L.J., at p. 493.

(*c*) *Sunbolf* v. *Alford*, *supra*. This point was not always clear, for in *Newton* v. *Trigg* (1691), 1 Show. 268, EYRES, J., said: "Innkeepers are compellable by the constable to lodge strangers; they may detain the persons of the guests who eat, or the horse which eats, until payment."

(*d*) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270.

(*e*) *Gilbert* v. *Berkeley* (1696), Holt (K. B.), 366.

(*f*) *Chase* v. *Westmore* (1816), 5 M. & S. 180.

(*g*) *Mulliner* v. *Florence*, *supra*. At one time a different view of the law seems to have been taken. In Bac. Abr., tit. Inns and Innkeepers (D.), it is said: "If a horse be committed to an innkeper, it may be detained for the meat of the horse, but not for the meat of the guest; for the chattels are only in the custody of the law for the debt that arises from the thing itself, and not from any other debt due from the same party etc." In *Turrill* v. *Crawley*, *supra*, the judges expressly left this question open.

(*h*) *Snead* v. *Watkins* (1856), 26 L. J. (C. P.) 57; *Threfall* v. *Borwick* (1875), L. R. 10 Q. B. 210, Ex. Ch.; *Mulliner* v. *Florence*, *supra*; *Gordon* v. *Silber* (1890), 25 Q. B. D. 491.

(*i*) *Skipwith* v. —— (1611), 1 Bulst. 170 (court divided); *Robinson* v. *Walter* (1616), 3 Bulst. 269; *Turrill* v. *Crawley*, *supra*; *Snead* v. *Watkins* (1856), 26 L. J. (C. P.) 57; *Threfall* v. *Borwick*, *supra*; *Mulliner* v. *Florence*, *supra*; *Gordon* v. *Silber*, *supra*; *Allen* v. *Smith*, (1862), 12 C. B. (N. S.) 638.

(*k*) *Skipwith* v. ——, *supra*; *Robinson* v. *Walter*, *supra*.

(*l*) *Stirt* v. *Drungold* (1617), 3 Bulst. 289; *Mulliner* v. *Florence*, *supra*; *Gordon* v. *Silber*, *supra*.

(*m*) *Johnson* v. *Hill* (1822), 3 Stark. 172.

(*n*) See the cases cited in the foregoing notes (*h*)—(*m*).

guest if they are in fact received by the innkeeper (*o*). But an innkeeper has no lien upon stolen articles received, not in his capacity as innkeeper, but upon some distinct contract such as a contract for security for the loan of money (*p*).

Extent of lien.

An article not brought by the guest to the inn at the time of his coming as a guest, but sent in by the owner on hire for the temporary use of the guest, to the knowledge of the innkeeper, is not subject to the innkeeper's lien, as to allow a lien in such circumstances would be contrary to good faith (*q*). So if an innkeeper knows at the time of its first coming that his guest has illegally brought another man's horse to the inn, he can claim no lien upon it as against the true owner (*r*).

If a man and his wife come as guests to an inn, the innkeeper's lien extends to the luggage of the wife as well as of the husband for the whole amount owing to the innkeeper (*s*), even though the wife's luggage is her separate estate and credit has been given by the innkeeper solely to the husband so as to prevent the innkeeper from suing the wife (*t*).

Duration of lien.

663. The lien exists only so long as the innkeeper retains possession of the goods (*u*). If a carrier puts up his horses at an inn from time to time, the innkeeper has no lien upon them for their food consumed on former occasions, although they subsequently come back into his possession, but he has a lien for their food consumed on such subsequent occasion until he again parts with possession of them (*a*).

Apparently a lien for food consumed by his horses on earlier occasions during a long stay of a guest is lost by the innkeeper if the guest's stay is broken by absences of several days' duration, although the horses are brought back to the inn and the innkeeper's lien attaches for the last portion of the guest's stay (*b*).

Possession is a matter of fact (*c*), but possession is given up if the innkeeper allows the sheriff to seize and does not assert his lien (*d*). But if the goods are fraudulently taken out of the

(*o*) *Threfall* v. *Borwick* (1875), L. R. 10 Q. B. 210, Ex. Ch. (case of a piano); but see the *dictum* of PARKE, B., to contrary effect, in *Broadwood* v. *Granara* (1854), 24 L. J. (EX.) 1, at p. 3.

(*p*) *Matsuda* v. *Waldorf Hotel Co., Ltd.* (1911), 27 T. L. R. 153 (case of stolen railway tickets handed by guest to innkeeper).

(*q*) *Broadwood* v. *Granara* (1854), 10 Exch. 417 (piano).

(*r*) *Broadwood* v. *Granara* (1854), 10 Exch. 417, *per* PLATT, B., at p. 423.

(*s*) *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A., *per* BRAMWELL, L.J., at p. 488.

(*t*) *Gordon* v. *Silber* (1890), 25 Q. B. D. 491.

(*u*) *Jones* v. *Pearle* (1723), 1 Stra. 556, *sub nom. Jones* v. *Thurloe*, 8 Mod. Rep. 172; *Wilkins* v. *Carmichael* (1779), 1 Doug. (K. B.) 101, *per* Lord MANSFIELD, at p. 105; *Taylor* v. *Robinson* (1818), 8 Taunt. 648; *Jacobs* v. *Latour* (1828), 5 Bing. 130; *Bernal* v. *Pim* (1835), 1 Gale, 17, *per* PARKE, B., at p. 19; *Legg* v. *Evans* (1840), 6 M. & W. 36; *Orchard* v. *Rackstraw* (1850), 9 C. B. 698.

(*a*) *Jones* v. *Pearle*, *supra*.

(*b*) *Allen* v. *Smith* (1862), 12 C. B. (N. S.) 638 (race-horses taken away at intervals to race at race meetings).

(*c*) *Taylor* v. *Robinson*, *supra*.

(*d*) *Jacobs* v. *Latour*, *supra*; see *Legg* v. *Evans*, *supra*, and title EXECUTION, Vol. XIV., p. 51.

SECT. 2. Lien.

innkeeper's custody in order to destroy his lien, he has a right to repossess himself of them (*e*).

Property must be brought by a guest.

664. An innkeeper has no lien upon a stolen horse placed with him by the police, as it is not brought to the inn by a guest (*f*). Nor has he any lien if the goods, even a horse and carriage, did not come into his possession in his character of innkeeper (*g*).

If, however, the goods are brought to the inn by a guest, the innkeeper's lien upon the goods will continue so long as the person bringing them retains his character of guest (*h*).

No power to charge for housing.

665. No costs of housing goods retained under a lien can be charged by the innkeeper, as the goods are housed for the benefit of the innkeeper, and not for the benefit of the guest (*i*). If such an extra charge be made and be paid under protest, it may be recovered back (*k*).

Acceptance of security.

666. An innkeeper who accepts security from his guest for the payment of hotel charges does not thereby lose or waive his lien upon the goods of the guest for the amount of such charges, unless there is something in the nature of the security, or in the circumstances in which it is taken, which is inconsistent with the existence or continuance of the lien, and therefore destructive of it (*l*). A lien may perhaps be waived if goods are claimed upon some other ground, and not upon the ground of a lien (*m*).

Duty to take care.

667. An innkeeper who retains the goods of a guest under his lien is not bound to be more careful in keeping them than he would be of his own goods of the same kind (*n*).

SECT. 3.—*Sale* (*o*).

Power of sale

668. The landlord, proprietor, keeper, or manager of any hotel, inn, or licensed public-house has, in addition to his ordinary lien,

(*e*) *Wallace* v. *Woodgate* (1824), 1 C. & P. 575.

(*f*) *Binns* v. *Pigot* (1840), 9 C. & P. 208; *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A. (case of tortious sale).

(*g*) *Smith* v. *Dearlove* (1848), 6 C. B. 132; and see *Matsuda* v. *Waldorf Hotel Co., Ltd.* (1910). 27 T. L. R. 153.

(*h*) *Allen* v. *Smith* (1862), 12 C. B. (N. S.) 638; and as to the characteristics of a guest, see p. 313, *ante*.

(*i*) See *British Empire Shipping Co.* v. *Somes* (1858), E. B. & E. 353, 367, Ex. Ch.; affirmed *sub nom. Somes* v. *British Empire Shipping Co.* (1860), 8 H. L. Cas. 338.

(*k*) *Somes* v. *British Empire Shipping Co., supra*.

(*l*) *Angus* v. *McLachlan* (1883), 23 Ch. D. 330; *Cowell* v. *Simpson* (1809), 16 Ves. 275, 280; *Raitt* v. *Mitchell* (1815), 4 Camp. 146; *Crawshay* v. *Homfray* (1820), 4 B. & Ald. 50; *Matsuda* v. *Waldorf Hotel Co., Ltd., supra*.

(*m*) See *Boardman* v. *Sill* (1808), 1 Camp. 410, n., and title LIEN.

(*n*) *Angus* v. *McLachlan, supra*.

(*o*) At common law there was no right in the innkeeper to sell goods retained under a lien, even when the keeping of the goods, as in the case of a horse, occasioned considerable expense (*Thames Iron Works Co.* v. *Patent Derrick Co.* (1860), 1 John. & H. 93); but there was a special custom as to the sale of a horse in London and in Exeter (*Moss* v. *Townsend* (1612), 1 Bulst. 207; *Gilbert* v. *Berkeley* (1696), Holt. (K. B.), 366; *Thames Iron Works Co.* v. *Patent Derrick Co., supra*). The custom of London was, that if a man leave his horse at an inn in London and there he eats up in hay and provender more than he is worth, that the horse should be appraised by the innkeeper's next

SECT. 3. Sale.

the right absolutely to sell and dispose by public auction of any goods, chattels, carriages, horses, wares, or merchandise which may have been deposited or left in the house he keeps, or in the coach-house, stable, stable-yard, or other premises appurtenant or belonging thereunto, where the person depositing or leaving such goods, chattels, carriages, horses, wares, or merchandise is or becomes indebted to the innkeeper either for any board or lodging, or for the keep and expenses of any horse or other animal left with or standing at livery in the stables or fields occupied by the innkeeper.

Time for sale.

No such sale is to be made until after the goods, chattels, carriages, horses, wares, or merchandise have been for six weeks in such charge or custody, or in or upon such premises, without such debt having been paid or satisfied; and the innkeeper, after having, out of the proceeds of such sale, paid himself the amount of the debt, together with the costs and expenses of the sale, must on demand pay over the surplus to the person depositing or leaving the goods or horses; but the debt for the payment of which a sale is made shall not be any other nor greater debt than the debt for which the goods or other articles could have been retained by the innkeeper under his lien.

Advertisement.

At least one month before the sale an advertisement must be inserted in one London newspaper and one country newspaper circulating in the district where the goods were left, containing notice of the intended sale, and giving shortly a description of the goods and chattels intended to be sold, together with the name (if known) of the owner or person who deposited or left the same (*p*).

neighbour, and afterwards be sold for payment of the money there owing for him. But every horse was to be sold to satisfy the debt due on his own meat only (*Moss* v. *Townsend*, *supra*). The custom of London and Exeter is slightly differently set out in Bac. Abr., tit. Inns and Innkeepers (D.). Where goods were deposited by way of security for a loan a right of sale might be inferred (*Pothonier* v. *Dawson* (1816), Holt (N. P.), 383).

(*p*) Innkeepers' Act, 1878 (41 & 42 Vict. c. 38), s. 1.

INNS OF COURT.

See BARRISTERS.

INNUENDO.

See LIBEL AND SLANDER.

INQUEST.

See CONSTITUTIONAL LAW; CORONERS.

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See CONSTITUTIONAL LAW; CORONERS; CROWN PRACTICE; JURIES; LUNATICS AND PERSONS OF UNSOUND MIND.

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INSURANCE.

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Part I.—Marine Insurance.

SECT. 1.—*In General.*

SUB-SECT. 1.—*The Marine Insurance Act*, 1906.

The Marine Insurance Act, 1906, and its application.

669. On the 1st January, 1907, the Marine Insurance Act, 1906 (*a*), came into operation. Its title is "An Act to codify the law relating to Marine Insurance," and where the context so permits,

(*a*) 6 Edw. 7, c. 41; frequently referred to in the text, throughout this part of the title, as "the Act."

it is frequently referred to, throughout this part of this title, as "the Act."

The canon of construction applicable to a codifying statute has been, in several cases, laid down in the following manner: "The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view" (*b*).

The Act, however, embodies only some and not all the legal principles and rules of marine insurance, and its language is so extremely concise and general that its full import and meaning can scarcely be understood without referring to the existing law which it was intended to express, or to the decided cases from which that law was evolved. Moreover, it is often left in doubt whether or not that law was intended to be altered. For these reasons, as well as because the Act does not apply to insurances effected before the 1st January, 1907, it will generally be necessary, notwithstanding the above-mentioned canon of construction, to ascertain the law as it stood at that date, and to illustrate it by decided cases (*c*).

General character of the Act.

670. The Act codifies only those principles of the law which relate exclusively to marine insurance. Thus it does not lay down rules which apply to contracts in general, such as those relating to fraud, mistake, or illegality, nor those relating to such special subjects as the duties of the master of a ship, salvage, or general average; it does not attempt to define who is to be deemed in time of war an alien enemy or a neutral, or by what acts the character of neutrality may be forfeited. All such matters are excluded, because they more properly belong to other departments of law, such as the law of contract, the law of shipping and navigation, prize law and international law; and therefore it (*d*) expressly provides that "the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance."

SUB-SECT. 2.—*Nature of Marine Insurance and Maritime Adventure: Definitions.*

Contract of marine insurance.

671. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the

(*b*) *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107, per Lord HERSCHELL, at p. 144; *Robinson* v. *Canadian Pacific Rail. Co.*, [1892] A. C. 481, P. C. See also, to the same effect, the judgment of COZENS-HARDY, M.R., in *Bristol Tramways etc. Carriage Co., Ltd.* v. *Fiat Motors, Ltd.*, [1910] 2 K. B. 831, C. A., at p. 836. As to the construction of statutes generally, see title STATUTES.

(*c*) The excellent edition of 1909 of "Arnould on Marine Insurance" by de Hart and Simey should be consulted for the history of marine insurance, and for a more detailed statement of the usages and practice in marine insurance business. Reference will sometimes be made to it for the discussion of doubtful points.

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 91 (2).

SECT. 1. In General.

extent thereby agreed, against marine losses, that is to say, losses incident to marine adventure (*e*). The instrument in which the contract of marine insurance is generally embodied is called a policy. The insurer is commonly called the underwriter, because he subscribes the policy. The thing or property insured is called the subject-matter of insurance, and the interest of the assured in such subject-matter is called his insurable interest. The consideration for which the insurer undertakes to indemnify the assured is called the premium. That which is insured against is the loss arising from maritime perils and casualties, and these are called the perils insured against, or the losses covered by the policy.

Policy.

Underwriter.

Subject-matter of insurance.

Premium.

Perils insured against.

Attachment of policy.

When the liability of the underwriter commences under the contract, the policy is said to attach; or, in other words, the risk is said to attach, or to begin to run from that time.

Valued policy.

Open policy.

672. It is convenient to distinguish between the following kinds of marine policies. A valued policy is a policy which specifies the agreed value of the subject-matter insured (*f*); an unvalued policy, often called an open policy, is one which does not specify the value of the subject-matter, but leaves it to be subsequently ascertained (*g*).

Voyage policy.

Time policy.

Where the contract is to insure the subject-matter "at and from," or "from," one place to another, the policy is called a "voyage policy": when the contract is to insure the subject-matter for a definite period of time, the policy is called a "time policy" (*h*).

Floating policy.

A floating policy is one which describes the insurance in general terms and leaves the name of the ship or ships or other particulars to be defined by subsequent declaration (*i*). There are also floating policies which cover shipments of goods made on a given ship within a certain period of time fixed by the policy, as declared by the assured; but such floating policies are really insurances of goods for a series of voyages (*j*).

Insurances of goods for series of voyages.

SUB-SECT. 3.—*Subject-matter of Insurance and the Risks Insured against.*

Definition of marine adventure.

673. The most usual insurances are on ship or goods, freight or profits, but every lawful marine adventure may be the subject of a contract of marine insurance; and there is a "marine adventure" whenever any ship, goods, or other moveables (*k*), such as money or securities, are exposed to maritime perils (*l*).

Maritime perils.

"Maritime perils" means perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 1. A contract of insurance is not a perfect contract of indemnity, for, as will be seen later (pp. 380, 462 *et seq.*, *post*), the assured in some cases receives more and in others less than a complete indemnity. See also title GUARANTEE, Vol. XV., pp. 443, 444.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 27.

(*g*) *Ibid.*, s. 28.

(*h*) *Ibid.*, s. 25 (1).

(*i*) *Ibid.*, s. 29 (1).

(*j*) *Johnson & Co., Ltd.* v. *Bryant* (1896), 1 Com. Cas. 363.

(*k*) "Moveables" means any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 90).

(*l*) *Ibid.*, s. 3 (1).

detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy (*m*).

Thus a carrier of goods by sea, a charterer of a vessel, and a company that lays down an electric cable are all engaged in marine adventures (*n*).

A marine policy may also cover land risks.

674. A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or against any land risk which may be incidental to a sea voyage; and it may also cover a ship in the course of building, or the launch of a ship, or any adventure analogous to a marine adventure (*o*).

Generally speaking, the underwriter of a marine policy insures only against risks at sea, but where there is a usage by which the ship's furniture or stores are regularly landed at a certain stage of the voyage, they are held to be protected when thus put on shore (*p*).

A policy on goods often contains a "warehouse to warehouse" clause (*q*). Frequently, also, goods are insured by the same policy for transit partly by sea (*r*) and partly by land (*s*), or by inland navigation (*t*).

SUB-SECT. 4.—*The Policy and its Essentials.*

Essential requisites in a policy.

675. Marine policies vary greatly in form and in the clauses they contain, but, subject to any statutory provisions, a contract of marine insurance is inadmissible in evidence, unless it is embodied in a policy (*u*) which specifies (1) the name of the assured or of some person who effects the insurance on his behalf; (2) the subject-matter insured and the risk insured against; (3) the voyage or period of time

(*m*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 3 (2), which contains the following provisions :—"In particular, there is a marine adventure (a) where any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as 'insurable property'; (b) where the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements is endangered by the exposure of insurable property to maritime perils; (c) where any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

(*n*) *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478 (carrier); *Paterson* v. *Harris* (1861), 1 B. & S. 336, 355; *Wilson* v. *Jones* (1867), L. R. 2 Exch. 139, Ex. Ch. (shareholder in cable company).

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 2.

(*p*) *Pelly* v. *Royal-Exchange Assurance Co.* (1757), 1 Burr. 341; *Brough* v. *Whitmore* (1791), 4 Term Rep. 206.

(*q*) For the wording of which see p. 384, *post*.

(*r*) See Arnould on Marine Insurance, s. 447, note (c). For a clause by which goods were covered while temporarily placed on a quay, see *Ide* v. *Chalmers* (1900), 5 Com. Cas. 212.

(*s*) *Rodoconachi* v. *Elliott* (1873), L. R. 9 C. P. 518, Ex. Ch.; *Simon, Israel & Co.* v. *Sedgwick*, [1893] 1 Q. B. 303, C. A.; *Hyderabad (Deccan) Co.* v. *Willoughby*, [1899] 2 Q. B. 530; *Robinson Gold Mining Co.* v. *Alliance Insurance Co.*, [1904] A. C. 359; *Schloss Brothers* v. *Stevens*, [1906] 2 K. B. 665.

(*t*) *Apollinaris Co.* v. *Nord Deutsche Insurance Co.*, [1904] 1 K. B. 252.

(*u*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 22.

SECT. 1. In General.

or both, as the case may be, covered by the insurance; (4) the sum or sums insured; (5) the name or names of the insurers (*v*). The policy must, moreover, be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient (*a*).

Policy must be properly stamped.

676. A contract for sea insurance other than such insurance as is referred to in the Merchant Shipping Act, 1894, s. 506 (*b*), is not valid unless the same is expressed in a policy (*c*), which cannot be given in evidence unless it is duly stamped (*d*). And this must, except in certain specified cases, be done before it is executed; but a policy, although not duly stamped, may, for the purpose of production in evidence, be stamped after execution on payment of a penalty of £100 (*e*).

(*v*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 23.

(*a*) *Ibid.*, s. 24 (1). As to the execution of contracts by or on behalf of companies, see title COMPANIES, Vol. V., p. 299. Moreover, the Stamp Act, 1891 (54 & 55 Vict c. 39), s. 93 (3) (which is unaffected by the Marine Insurance Act (see *ibid.*, s. 91 (1)), provides that "a marine policy shall not be valid, unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured"; see *Home Marine Insurance Co.* v. *Smith*, [1898] 2 Q. B. 351, C. A.; *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega*, [1902] 2 K. B. 384, C. A.; *Empress Assurance Corporation* v. *Bowring & Co.* (1905), 11 Com. Cas. 107.

(*b*) 57 & 58 Vict. c. 60, *i.e.*, against events (loss of life, personal injury, loss or damage caused to goods) in respect of which shipowners' liability is limited, when happening without their fault or privity by ss. 502, 503, *ibid.* See also title SHIPPING AND NAVIGATION. This enactment is substituted for that mentioned in the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 93 (1), by the effect of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (1).

(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 93 (1); *Genforsikrings Aktieselskabet (Skandinavia Reinsurance Co. of Copenhagen)* v. *Da Costa*, [1911] 1 K. B. 137. By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 93 (2), the maximum duration of the policy is twelve months. See p. 382, *post.* As to what the policy must contain, see p. 337, *ante.*

(*d*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (4). See also title EVIDENCE, Vol. XIII., p. 515. As to the admissibility in evidence for certain purposes of the slip though unstamped, see p. 348, *post.*

(*e*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 95, provides that:—"(1) A policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, except in the two cases following; that is to say, (a) any policy of mutual insurance having a stamp impressed thereon may, if required, be stamped with an additional stamp provided that at the time when the additional stamp is required the policy has not been signed or underwritten to an amount exceeding the sum or sums which the duty impressed thereon extends to cover; (b) any policy made or executed out of, but being in any manner enforceable within the United Kingdom, may be stamped at any time within ten days after it has been first received in the United Kingdom on payment of the duty only. (2) Provided that a policy of sea insurance shall for the purpose of production in evidence be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of £100."

S. 92 (1) (*ibid.*) defines the meaning of sea insurance; and s. 97 (*ibid.*) imposes a penalty of £100 on making or paying a premium or loss upon insurance otherwise than by a duly stamped policy or issuing copies of a policy not duly stamped (see *Genforsikrings Aktieselskabet (Skandinavia Reinsurance Co. of Copenhagen)* v. *Da Costa*, *supra*), besides disabling the agent concerned with such a policy from recovering any commission etc. in respect thereof.

The Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched., prescribes the stamp duties

SECT. 2.—*Insurance Policies and their Construction.*

SUB-SECT. 1.—*The Insurers: Private Underwriters and Insurance Companies.*

677. All persons competent to contract (*f*) may be parties to a contract of insurance. A policy may be underwritten by individuals or by a company. In the latter case the corporate seal may be sufficient; but the form of execution may be indefinitely varied by the statute, charter, deed, or memorandum of association under which the company is constituted (*g*) or the articles by which it is regulated. Where the policy is underwritten by individuals, as in clause 19 of Lloyd's policy (*h*), they sign their names at the foot of the policy, writing opposite thereto the sum insured by each; and the effect of this is that each makes a separate contract with the assured for the amount set opposite to his name, the assured thereby acquiring a right of action against each separately and not against all jointly (*i*).

Lloyd's.

In 1719 the Royal Exchange Assurance Corporation and the London Assurance Corporation were incorporated with the exclusive right of making sea insurances in their corporate capacity (*k*); but this monopoly was taken away in the year 1824 (*l*). Soon afterwards a great number of insurance companies were formed, either by charter from the Crown or by special statutes or under the provisions of a partnership deed. But, apart from banking companies, no company, association, or partnership consisting of more than twenty persons formed on or after the 2nd November, 1862, for the acquisition of gain by the company, association, or

Royal Exchange Assurance Corporation.

London Assurance Corporation.

Illegal companies.

on policies of sea insurance. The Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 91, defines the expression "policy of insurance."

On the question of stamp duties, see, further, *Re Teignmouth and General Mutual Shipping Association, Martin's Claim* (1872), L. R. 14 Eq. 148; *Blyth & Co.'s Case* (1872), L. R. 13 Eq. 529; *Genforsikrings Aktieselskabet* (*Skandinavia Reinsurance Co. of Copenhagen*) v. *Da Costa*, [1911] 1 K. B. 137. In *Nixon* v. *Albion Marine Insurance Co.* (1867), L. R. 2 Exch. 338, the court ordered a special case to be struck out on the ground that the action was brought on a contract of marine insurance, and it appeared that no stamped policy had ever been executed. As to stamp duties, generally, see title REVENUE.

(*f*) See title CONTRACT, Vol. VII., p. 341.

(*g*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 24 (1); *Reid* v. *Allan*, *Cross v. Same* (1849), 4 Exch. 326; *Dowdall* v. *Allan*, *Same* v. *Clark* (1849), 19 L. J. (Q. B.) 41; and see title COMPANIES, Vol. V., pp. 37, 64.

(*h*) See note (*p*), p. 340, *post*.

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 24 (2); *Tyser* v. *Shipowners Syndicate* (*Reassured*), [1896] 1 Q. B. 135; *Leo Steamship Co., Ltd.* v. *Corderoy* (1896), 1 Com. Cas. 300, 379, C. A. As regards the history of the association of Lloyd's, see Arnould on Marine Insurance, s. 77. The association appoints agents in all the principal ports of the world, whose duty it is to forward regularly to Lloyd's accounts of all departures from and arrivals at their ports, as well as of losses and casualties and general information relating to shipping and insurance, but these agents are appointed by the corporation of Lloyd's and are not agents of the underwriters (*Wilson* v. *Salamandra Assurance Co. of St. Petersburg* (1903), 8 Com. Cas. 129). The corporation of Lloyd's require a deposit of securities of the minimum value of £5,000 to cover the engagements of each underwriting member; see *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, C. A.

(*k*) Stat. (1719) 6 Geo. 1, c. 18.

(*l*) Stat. (1824) 5 Geo. 4, c. 114.

SECT. 2. Insurance Policies and their Construction.

partnership or its members is legal (*m*), and therefore no marine insurance company is legal unless registered under the Companies Acts, 1862—1908 (*n*), or formed in pursuance of some other Act or letters patent (*o*).

SUB-SECT. 2.—*Lloyd's Policy.*

Lloyd's policy.

678. Almost all insurances effected in the United Kingdom are framed on the model of a policy called "Lloyd's policy," a copy of which is set out in the note below (*p*).

(*m*) See title COMPANIES, Vol. V., pp. 44, 45. As to companies formed before 1862, see the repealed enactments, stat. (1844) 7 & 8 Vict. c. 110, and Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 209, 210; *Hambro'* v. *Hull and London Fire Insurance Co.* (1858), 3 H. & N. 789; *Re Phœnix Life Assurance Co., Burges and Stock's Case* (1862), 2 John. & H. 441.

(*n*) See title COMPANIES, Vol. V., pp. 25—33.

(*o*) See *Shaw* v. *Benson* (1883), 11 Q. B. D. 563, C. A.; *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137; *Re Phœnix Life Assurance Co., Burges and Stock's Case, supra; Hambro'* v. *Hull and London Fire Insurance Co., supra;* and see *Re Law Car and General Insurance Corporation, Ltd.*, [1911] W. N. 91; affirmed, [1911] W. N. 101, C. A. (whether special reinsurance agreement required registration as mortgage). See also titles COMPANIES, Vol. V., pp. 45, 766, 767; PARTNERSHIP. As to mutual insurance and protecting associations or clubs, see p. 504, *post.*

S. G.

£

Delivered the —— day of ——, 19—.

No. ——.

[STAMP.]

10,000 [aggregate of sums insured.]

(*p*) BE IT KNOWN THAT (1) [] as well in [] own name as for and in the name and names of all and every other person or persons, to whom the same doth, may or shall appertain, in part or in all; doth make assurance, and cause (2) [] and them and every of them to be insured, (3) lost or not lost, at and from (4) [] (5) upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel, (6) called the []; whereof is master, under God, for this present voyage (6) [], or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship or the master thereof is or shall be named or called.

(1) & (2) Blanks for the name or names of the party for whom or by whom the policy is effected.

(3) Clause "lost or not lost."

(4) Blank for the description of the voyage insured.

(5) Clause specifying the subject insured.

(6) Blanks for the name of ship and master.

(7) BEGINNING the adventure upon the said goods and merchandises from the loading thereof aboard the said ship []; upon the said ship, &c. [], and so shall continue and endure, during her abode there upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at []; upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises, until the same be there discharged and safely landed.

(7) Description of the commencement, continuance, and termination of the risk.

(8) AND it shall be lawful for the said ship, &c., in this voyage, to proceed, and sail to, and touch, and stay at any ports, or places whatsoever, [] without prejudice to this insurance.

(8) Liberty to touch and stay.

(9) THE said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at [].

(9) Valuation clause, and blank for inserting valu

(10) TOUCHING the adventures and perils which we, the assurers, are contented to bear and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints and detainments of

(10) Clause enumerating the perils insured against.

SECT. 2. Insurance Policies and their Construction.

679. The language used in this policy, which was introduced into England more than three centuries ago, is evidently both ungrammatical and obscure (*q*), and would not be intelligible without the aid of usage and judicial decisions; but its meaning has now been determined by certain rules of construction, as well as by usage and statutory provisions (*r*). The various clauses in Lloyd's policy will be treated separately; but there are certain principles of construction and interpretation which apply generally to all policies of marine insurance.

all kings, princes and people of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, and ship, &c., or any part thereof.

(11) AND in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in, and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we the assurers will contribute, each one according to the rate and quantity of his sum herein assured. (11) Sue and labour clause.

(12) AND it is especially declared and agreed that no acts of the insurer or insured, in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. (12) Waiver clause.

(13) AND it is agreed by us, the insurers, that this writing, or policy of assurance, shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street or in the Royal Exchange, or elsewhere in London. (13) Clause as to the binding effect of the policy.

(14) AND so we the assurers are contented and do hereby promise, and bind ourselves each one for his own part, our heirs, executors and goods, to the assured, their executors, administrators and assigns, for the true performance of the premises. (14) Promise of the underwriters to indemnify.

(15) CONFESSING ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of (16) []. (15) Acknowledgment of receipt of premium. (16) Blank for inserting rate of premium.

(17) IN witness whereof we, the assurers, have subscribed our names and sums insured in London. (17) Attestation clause.

(18) N.B. Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under £5 per cent.; and all other goods, also the ship and freight, are warranted free from average under £3 per cent., unless general, or the ship be stranded. (18) Common memorandum.

(19) [

£	(*sum in figures*)	A.B.	(*sum in words*)	day of	A.D.
£	(*ditto*)	C.D.	(*ditto*)	day of	A.D.
£	(*ditto*)	E.F.	(*ditto*)	day of	A.D.

(*and so on, until the aggregate amount of the different sums subscribed by each underwriter equals the amount required to be insured*). (19) Blank space in which is to be inserted the subscription of each underwriter, the sum he insures, and the date of his subscription.

The above form is now embodied in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I.; see *ibid.*, s. 30.

(*q*) *Marsden* v. *Reid* (1803), 3 East, 572, *per* LAWRENCE, J., at p. 579; *Le Cheminant* v. *Pearson* (1812), 4 Taunt. 367, *per* MANSFIELD, C.J., at p. 380.

(*r*) See title CUSTOM AND USAGES, Vol. X., pp. 297, 298. The various blanks in the policy are generally filled in by written words, and in order to meet the exigencies of commerce special clauses are constantly inserted or incorporated by way of reference; see, for instance, the York-Antwerp Rules, pp. 508, *et seq.*, *post*.

SECT. 2. Insurance Policies and their Construction.

SUB-SECT. 3.—*General Rules of Construction of Marine Policies.*

General principles of construction.

680. A contract of marine insurance is to be construed, like all other commercial instruments, so as to give effect to the intention of the parties as expressed in the written contract (*s*). The most general rule of construction is that the policy is to be construed according to its sense and meaning, as collected in the first place from the terms used in it; and these terms are to be understood in their plain, ordinary, and popular sense, unless they have by the known usage of trade acquired a peculiar meaning distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense (*t*).

Full effect to be given to every provision written or printed.

681. Of rules of construction which have reference only to the words actually used, and not to the admission of parol evidence for the purpose of explaining or adding to the contract, one of the most important is that full effect must, if possible, be given to every provision, written or printed, contained in the policy, although it may be one which the assured would have rejected, had it been present to his mind at the time of his entering into the contract (*u*); but greater weight is, in case of inconsistency (*a*), given to a written than to a printed clause, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects (*b*).

Relative weight of written, as against printed, clause.

Printed words.

Printed words will, therefore, be considered as struck out if they be absolutely inconsistent with the written words, or if it be clear that the latter were to be in substitution for the former. For instance, the printed clause 5 (*c*) describing the subject-matter insured is applicable where both ship and goods are insured; but the subject-matter really insured in any particular case is always specified in writing at the foot or in the margin of the policy, as, for example, "on goods," "ship," "freight," "100 bags of rice" etc.,

(*s*) *Carr* v. *Montefiore* (1864), 5 B. & S. 408, Ex. Ch., *per* ERLE, J., at p. 428. As to whether a contract made abroad should be construed by English or foreign law, see title CONFLICT OF LAWS, Vol. VI., pp. 238 *et seq.*, and *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega*, [1901] 2 K. B. 567, 574; affirmed, [1902] 2 K. B. 384, 393, C. A.

(*t*) *Robertson* v. *French* (1803), 4 East, 130, *per* Lord ELLENBOROUGH, C.J., at p. 135; applied, *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. 499, 501, C. A.; *Birrell* v. *Dryer* (1884), 9 App. Cas. 345. See titles CONTRACT, Vol. VII., p. 510; CUSTOM AND USAGES, Vol. X., pp. 260, 297.

(*u*) *Pearson* v. *Commercial Union Assurance Co.* (1876), 1 App. Cas. 498; *Haughton* v. *Empire Marine Insurance Co.* (1866), L. R. 1 Exch. 206.

(*a*) *Gumm* v. *Tyrie* (1864), 4 B. & S. 680, *per* CROMPTON, J., at p. 707; affirmed (1865), 6 B. & S. 298, Ex. Ch.

(*b*) *Robertson* v. *French*, *supra*, at p. 136; *Joyce* v. *Realm Insurance Co.* (1872), L. R. 7 Q. B. 580, *per* BLACKBURN, J., at p. 583; *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284, *per* Lord PENZANCE, at p. 293. This rule only applies where there is inconsistency between the printed and the written words.

(*c*) See note (*p*), p. 340, *ante*.

and in such cases these written words are considered as substituted for the printed words, although the latter are not struck out of the policy (*d*).

For a similar reason no effect will be given to a printed clause in a policy where it is inconsistent with the object and purpose of the insurance (*e*). Thus, no effect will be given to the suing and labouring clause contained in a policy of reinsurance (*f*), or in a policy indemnifying the shipowners against liability to owners of cargo for negligence (*g*).

Surrounding circumstances.

682. Another general rule of construction is that one has, in interpreting an instrument, to look at all the surrounding circumstances known to the parties at the time of the making of the contract (*h*), and that where the words of the contract are ambiguous the acts, conduct, and course of dealing of the parties before and at the time they entered into it may and should be considered and taken into account with a view of discovering the intention of the parties as expressed by them in the contract (*i*).

Technical words.

683. Words used in a policy may be technical words not employed in ordinary language; in such a case evidence may be given of their technical meaning as if they were words in a foreign language. Again, although the words used may have an ordinary meaning, still evidence may be adduced to show that they have a different and peculiar meaning in insurance business or in the export or import trade to which the particular insurance relates, and effect will be given to such secondary meaning, unless it appears from the circumstances of the case or the terms of the policy that this was not the intention of the parties (*k*).

Thus, in the memorandum by which underwriters exempt

(*d*) *Robertson* v. *French* (1803), 4 East, 130; *Haughton* v. *Ewbank* (1814), 4 Camp. 88; compare *Robinson* v. *Tobin* (1816), 1 Stark. 336; *Western Assurance Co. of Toronto* v. *Poole*, [1903] 1 K. B. 376.

(*e*) *Hydarnes Steamship Co.* v. *Indemnity Mutual Marine Assurance Co.*, [1895] 1 Q. B. 500, C. A. (clause as to commencement of risk); distinguished, *Beacon Life and Fire Assurance Co.* v. *Gibb* (1862), 1 Moo. P. C. C. (N. S.) 73 ("premises" in fire policy applied to ship).

(*f*) *Uzielli* v. *Boston Marine Insurance Co.* (1884), 15 Q. B. D. 11, C. A.; *Western Assurance Co. of Toronto* v. *Poole*, *supra*. As to the suing and labouring clause, see p. 456, *post*.

(*g*) *Cunard Steamship Co.* v. *Marten*, [1903] 2 K. B. 511, C. A.; affirming S. C., [1902] 2 K. B. 624, *per* WALTON, J., at p. 627; applied, *Western Assurance Co. of Toronto* v. *Poole*, *supra*.

(*h*) *Carr* v. *Montefiore* (1864), 5 B. & S. 408, Ex. Ch., *per* ERLE, C.J., at p. 428; *Lewis* v. *Great Western Rail. Co.* (1877), 3 Q. B. D. 195, 208, C. A. (forwarding note).

(*i*) *Houlder Brothers & Co., Ltd.* v. *Public Works Commissioner*, *Public Works Commissioner* v. *Houlder Brothers & Co., Ltd.*, [1908] A. C. 276, 285, P. C. (demurrage clause in contract of sale); *Bank of New Zealand* v. *Simpson*, [1900] A. C. 182, 188, P. C.; *Montefiore* v. *Lloyd* (1863), 15 C. B. (N. S.) 203; *Leathley* v. *Spyer* (1870), L. R. 5 C. P. 595, which were actions on contracts guaranteeing that an employee would duly pay over moneys received, and decided entirely by reference to the surrounding circumstances; and see title CONTRACT, Vol. VII., p. 524.

(*k*) *Mason* v. *Skurray* (1780), 1 Park on Marine Insurance, 8th ed., 253. See also titles CONTRACT, Vol. VII., pp. 511 *et seq.*; CUSTOM AND USAGES, Vol. X., pp. 260 *et seq.*, 297; EVIDENCE, Vol. XIII., pp. 430, 444.

SECT. 2. Insurance Policies and their Construction.

themselves from liability on certain perishable articles, evidence is admissible to show that the word "corn" is meant to comprehend every sort of grain (*l*), and also beans and peas (*m*), but that it does not include rice (*n*).

Again, it may be shown that the word "port" has in the mercantile sense a more or less extensive meaning than its legal or political limits, and in such case effect will be given to its mercantile sense (*o*).

Geographical terms.

684. Where words descriptive of seas or countries have among mercantile men a sense differing from their common or geographical import, evidence of their mercantile meaning is admissible, and effect will be given to such meaning (*p*). Thus, where an insurance is made "from London to any port in the Baltic," although among geographers the Gulf of Finland is not included in the Baltic, yet upon evidence showing that it is comprehended in the Baltic in commercial language the court will give this extension to the term "Baltic" in the policy (*q*).

SUB-SECT. 4.—*Incorporation of Usage.*

Incidents annexed by usage.

685. The language of a marine policy is so general and indeterminate that it requires in a far greater degree than most other mercantile contracts to be supplemented by evidence of usage. Such evidence is admissible not merely for the purpose of explaining ambiguous terms in the contract (*r*), but also for the purpose of adding incidents to it, subject, however, always to the following two conditions: (1) The usage must not be inconsistent with the express terms of the contract, and (2) it must be general and notorious in insurance business, or in the particular trade to which the contract relates (*a*).

Examples :— The voyage insured ;

Thus on looking at Lloyd's policy it will be found that the voyage

(*l*) *Moody* v. *Surridge* (1798), 1 Park on Marine Insurance, 8th ed., 245 (malt).

(*m*) *Mason* v. *Skurray* (1780), 1 Park on Marine Insurance, 8th ed., 253.

(*n*) *Scott* v. *Bourdillion* (1806), 2 Bos. & P. (N. R.) 213; compare *Journu* v. *Bourdieu* (1787), 1 Park on Marine Insurance, 8th ed., 245 (salt does not include saltpetre); *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. 499, C. A. (warranty against iron includes steel); *Hoskins* v. *Pickersgill* (1783), 1 Park on Marine Insurance, 8th ed., 126 (tackle and furniture); *Parr* v. *Anderson* (1805), 6 East, 202 (letters of marque).

(*o*) *Constable* v. *Noble* (1810), 2 Taunt. 403; *Payne* v. *Hutchinson* (1808), 2 Taunt. 405, n.; *Cockey* v. *Atkinson* (1819), 2 B. & Ald. 460; *Broun* v. *Tayleur* (1835), 4 Ad. & El. 241; *Sailing-ship "Garston" Co.* v. *Hickie* (1885), 15 Q. B. D. 580, C. A., *per* BRETT, M.R.; *Hunter* v. *Northern Marine Insurance Co.* (1888), 13 App. Cas. 717, *per* Lord WATSON, at p. 733.

(*p*) *Uhde* v. *Walters* (1811), 3 Camp. 16; *Moxon* v. *Atkins* (1812), 3 Camp. 200; *Royal Exchange Assurance Corporation* v. *Tod* (1892), 8 T. L. R. 669; and see title CUSTOM AND USAGES, Vol. X., pp. 264, 265. In the following cases the attempt to prove a special mercantile meaning was unsuccessful:— *Robertson* v. *Clarke* (1824), 1 Bing. 445; *Northey* v. *Trevillion* (1902), 7 Com. Cas. 201; *Birrell* v. *Dryer* (1884), 9 App. Cas. 345; and see *Houghton* v. *Gilbart* (1836), 7 C. & P. 701 (dictionary insufficient evidence).

(*q*) *Uhde* v. *Walters*, *supra*.

(*r*) As an example of reference to usage for explaining the terms of a policy, see *Otago Farmers' Co-operative Association of New Zealand* v. *Thompson*, [1910] 2 K. B. 145.

(*a*) The Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 87, contains the

insured is mainly defined by naming the port of departure and the port of destination, so that the course to be pursued by the vessel on the voyage between those two ports must necessarily be determined by usage. In short, what is usually done on the insured voyage with reference to ship or cargo is understood to be implied in every policy and to make a part of it as if it were expressed therein (*b*).

Intermediate voyages.

In accordance with this principle, intermediate voyages and goods landed and stored are held to be covered by the policy, if there be a general and well-known usage for ships engaged on the insured voyage to make such intermediate voyages, or for goods to be landed and stored in the course of it (*c*).

Usage must be consistent with the express terms of the contract.

686. No usage will be allowed to affect a contract of insurance unless it be consistent with the express terms of the contract; in other words, evidence of usage is never admissible to contradict what is plain (*d*). Thus where the risk on goods is expressed by the policy to be "till discharged and safely landed," evidence of usage will not be admitted to show that this clause means in the particular trade insured "until the ship was moored 24 hours in safety," because this is inconsistent with the plain language of the policy (*e*).

following provisions:—"(1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract; (2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement." See also titles CUSTOM AND USAGES, Vol. X., pp. 263 *et seq.*; EVIDENCE, Vol. XIII., p. 445.

(*b*) *Pelly* v. *Royal-Exchange Assurance Co.* (1757), 1 Burr. 341, *per* Lord MANSFIELD, at pp. 347, 350.

(*c*) *Pelly* v. *Royal-Exchange Assurance Co., supra; Tierney* v. *Etherington* (1743), cited in *Pelly* v. *Royal-Exchange Assurance Co., supra*, at p. 348 (as to storing goods). Where there was a general usage of the Newfoundland trade that the ships engaged in it after their arrival at Newfoundland were either employed for some time in fishing, or made intermediate voyages from one American port to another before beginning to load a cargo on the homeward voyage, it was held that under policies at and from Newfoundland such intermediate voyages, although not expressly allowed by the policy, did not affect its validity, and did not discharge the underwriters from a loss happening on the homeward voyage (*Noble* v. *Kennoway* (1780), 2 Doug. (K. B.) 510; *Vallance* v. *Dewar* (1808), 1 Camp. 503; *Ougier* v. *Jennings* (1800), 1 Camp. 505, n., *per* Lord ELDON, C.J.). As to the effect of usages existing in the China and East Indian trades, see *Pelly* v. *Royal-Exchange Assurance Co., supra; Brough* v. *Whitmore* (1791), 4 Term Rep. 206; *Salvador* v. *Hopkins, Heaton* v. *Rucker* (1765), 3 Burr. 1707; *Gregory* v. *Christie* (1784), 3 Doug. (K. B.) 419; *Farquharson* v. *Hunter* (1785), 1 Park on Marine Insurance, 8th ed., 105. Many illustrations of the same principle will be found in the section on deviation, duration and commencement of the risk (see pp. 384, 395, *post*), where it is shown that deviation may be justified by usage, and that the commencement and duration of the risk may be affected by the usages of maritime trade and business. See also *Kingston* v. *Knibbs* (1808), 1 Camp. 508, n.; *Moxon* v. *Atkins* (1812), 3 Camp. 200; *Brown* v. *Carstairs* (1811), 3 Camp. 161. See also title CUSTOM AND USAGES, Vol. X., p. 297.

(*d*) *Blackett* v. *Royal Exchange Assurance Co.* (1832), 2 Cr. & J. 244, *per* Lord LYNDHURST, C.B., at p. 249; *Provincial Insurance Company of Canada* v. *Leduc* (1874), L. R. 6 P. C. 224, 235; *Hall* v. *Janson* (1855), 4 E. & B. 500; *Crofts* v. *Marshall* (1836), 7 C. & P. 597, 607.

(*e*) *Parkinson* v. *Collier* (1797), 2 Park on Marine Insurance, 8th ed., 653.

SECT. 2. Insurance Policies and their Construction.

Usage must be general and notorious.

687. The usage, in order to be binding, must be general and notorious. It need not be a usage of the whole mercantile world of which the court would take judicial notice (*f*); but the usage merely of a particular place or a particular class of persons is not binding on other persons unless they are shown to be cognisant of it and have contracted with reference to it (*g*). The usage, however, need not be followed invariably at all times and by all persons in the trade: if it is notorious and prevails generally in the trade, the assured and underwriter are presumed to have notice of it and are bound by it (*h*).

It is also immaterial that the trade itself is of recent origin; it is sufficient if the usage has existed in such circumstances that it may be fairly presumed to be known to persons engaged in the trade, and that contracts of insurance relating to it are made with reference to such usage (*i*). But the usage, in order to be binding, at any rate on persons not cognisant of it, must be one which is not unreasonable (*k*).

Rules of practice expressly incorporated.

Usages or rules of practice are often incorporated in policies by reference, as, for instance, the rules known as the York-Antwerp Rules (*l*). An association of English Average Adjusters holds meetings from time to time at which rules of practice are also established, but as these rules are always intended to be altered or modified with reference to leading decisions they are not, if inconsistent with legal principles, binding on parties to the contract of insurance, unless they are expressly incorporated in the policy (*m*).

The question has arisen, and still seems open to doubt, whether an established usage can be excluded by parol agreement. See *Fawkes* v. *Lamb* (1862), 31 L. J. (Q. B.) 98 (contract of sale); Arnould on Marine Insurance, 2nd ed., p. 577; 1 Phillips, Law of Insurance, s. 594; 1 Duer on Marine Insurance, p. 276; 2 Duer on Marine Insurance, p. 668; and the conflicting judgments of BLACKBURN, J., and COCKBURN, C.J., in *Burges* v. *Wickham* (1863), 3 B. & S. 669, at pp. 685, 697. It is, however, not of much practical importance, since there is no reason why the policy should not be reformed if it be drawn up so as not to express the common intention of both parties. See *Xenos* v. *Wickham* (1863), 14 C. B. (N. S.) 435, Ex. Ch., *per* BLACKBURN, J., at p. 459.

(*f*) *Vallance* v. *Dewar* (1808), 1 Camp. 503.

(*g*) *Bartlett* v. *Pentland* (1830), 10 B. & C. 760, *per* Lord TENTERDEN, C.J., at p. 770; *Gabay* v. *Lloyd* (1825), 3 B. & C. 793; *Scott* v. *Irving* (1830), 1 B. & Ad. 605; *Sweeting* v. *Pearce* (1861), 9 C. B. (N. S.) 534; *Matvieff* v. *Crosfield* (1903), 8 Com. Cas. 120; *Stewart* v. *Aberdein* (1838), 4 M. & W. 211 (where the plaintiff's acquaintance with the usage was proved).

(*h*) *Vallance* v. *Dewar*, *supra*.

(*i*) Evidence of usage in one trade is admissible to prove that the same usage is binding on those engaged in another trade of the same kind carried on in the same way (*Noble* v. *Kennoway* (1780), 2 Doug. (K. B.) 510; and see title EVIDENCE, Vol. XIII., p. 445).

(*k*) *Ougier* v. *Jennings* (1800), 1 Camp. 505, n.; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802, *per* BRETT, J., at pp. 817, 818; and see title CUSTOM AND USAGES, Vol. X., pp. 269, 297.

(*l*) For these Rules, see pp. 508 *et seq.*, *post*.

(*m*) See *Atwood* v. *Sellar & Co.* (1879), 4 Q. B. D. 342, 363; affirmed, *Atwood* v. *Sellar* (1880), 5 Q. B. D. 286, 289, C. A. See the rules of practice adopted by the Association of Average Adjusters, May, 1908, set out in the Appendix D to Arnould on Marine Insurance and hereinafter, for brevity's sake, called "The Average Adjusters' Rules." In insurance on ships the practice is to incorporate in voyage and time policies respectively a number of clauses called the "institute voyage clauses" and the "institute time clauses," which have been

SUB-SECT. 5.—*Other Rules of Construction.*

SECT. 2. Insurance Policies and their Construction.

Other more special rules.

688. The following rules, of a more special and limited character, are often applied to policies of insurance. When a particular enumeration of causes is followed by such words as "or other," the latter expression must in some cases be limited to matters *ejusdem generis* (*n*). Again, there is an important rule of construction that in marine insurance contracts losses must be attributed to their proximate causes. These two rules receive full illustration elsewhere (*o*).

Moreover, where there is a latent ambiguity as to the subject-matter of the policy external evidence is admissible for the purpose of identifying it (*p*). Finally, where an ambiguity cannot be removed by any other rule of construction the maxim "*verba chartarum fortius accipiuntur contra proferentem*" is applied (*q*); it being, however, left for determination in each case, as regards any special provision in the policy, whether the insured or the insurer are to be considered the *proferentes* within the meaning of the rule (*r*).

SECT. 3.—*The Course of Business of Insurance.*

SUB-SECT. 1.—*Insurance Brokers: Course of Business between Broker and Underwriter.*

Insurance brokers.

689. A marine policy is generally effected by an insurance broker, who acts as middleman between the assured and the insurers, and whose business consists mainly in receiving instructions from the assured as to the nature of the risk and the rate of premium at which the insurance is to be effected (*s*), communicating these facts to the underwriters and effecting the policy on the best possible

altered from time to time. They are set out in Arnould on Marine Insurance, Appendix B.

(*n*) For a full explanation of this rule, see Lord WATSON'S judgment in *Sun Fire Office* v. *Hart* (1889), 14 App. Cas. 98, 103, P. C.; and see *Bolivia Republic* v. *Indemnity Mutual Marine Assurance Co., Ltd.*, [1909] 1 K. B. 785, C. A. See, further, p. 446, *post*.

(*o*) See, further, pp. 437 *et seq.*, *post*.

(*p*) *Macdonald* v. *Longbottom* (1859), 1 E. & E. 977; *Irving* v. *Richardson* (1831), 2 B. & Ad. 193; *Bank of New Zealand* v. *Simpson*, [1900] A. C. 182, P. C.; compare *Birrell* v. *Dryer* (1884), 9 App. Cas. 345 (where the court found no ambiguity). See also titles CONTRACT, Vol. VII., pp. 523, 527; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 453; EVIDENCE, Vol. XIII., p. 568.

(*q*) *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (1863), 3 B. & S. 917, 929; *Thomson* v. *Weems* (1884), 9 App. Cas. 671, 687; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591, 596, C. A.

(*r*) It has been said that in dealing with the construction of policies, whether life, fire, or marine, an ambiguous clause must be construed against rather than in favour of the insurer (*Re Etherington and Lancashire and Yorkshire Accident Insurance Co., supra, per* VAUGHAN WILLIAMS, L.J., at p. 596); but it is submitted that this proposition is inconsistent with the judgments in the House of Lords in *Birrell* v. *Dryer, supra*, and with the other authorities cited in note (*q*), *supra*, at any rate as regards marine policies, which (unlike fire and life policies) are framed in accordance with the slip prepared by the assured's broker. See p. 348, *post*.

(*s*) Where an insurance is effected "at a premium to be arranged" in the absence of arrangement, a reasonable premium is payable (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 31 (1)).

SECT. 3. The Course of Business of Insurance.

terms for the assured, paying the premium to the underwriters, and receiving from them whatever may be due from them under the policy in case of loss. In these matters the broker is the agent of the assured and not of the underwriters (*t*).

Course of business between assured, broker and underwriter.

690. The actual course of the business of marine insurance as carried on in London and elsewhere in this country, briefly stated, is as follows: A broker on receiving orders from his principal to effect an insurance prepares what is commonly known as a "slip," containing rough notes, sufficient, however, to indicate the terms of the proposed insurance. The broker then takes the slip round to the various underwriters, who may be private Lloyd's underwriters or underwriters on behalf of corporations. Those underwriters who are willing to accept the risk signify their willingness by initialling the slip for the amounts for which they are willing to become insurers. So far as the initials on the slip are those of Lloyd's underwriters a policy is prepared by the broker and taken round by him to the different underwriters for their signature. Insurance companies, however, prepare their own policies; and in order to enable them to do so the broker sends to each company a memorandum of the engagement which the particular company has already entered into by initialling the slip (*u*).

The insurance slip.

691. The insurance slip is in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract fixing the terms of the insurance and the premium, and neither party can without the assent of the other deviate from the terms agreed on without a breach of faith (*v*). In accordance with this practice it is provided that the contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped (*w*).

(*t*) *Empress Assurance Corporation* v. *Bowring & Co.* (1905), 11 Com. Cas. 107.

(*u*) For a more detailed statement of this course of business, see Arnould on Marine Insurance, s. 102. As to the mode in which accounts are usually kept between the broker and underwriter, and between broker and assured, see Arnould on Marine Insurance, ss. 104, 105. Sometimes insurance brokers guarantee the solvency of the underwriters. In such cases they are said to act *del credere*, or to be *del credere* agents (for which see title AGENCY, Vol. I., p. 153), and receive therefor a commission *del credere*. This commission is earned by entering into the contract of guarantee, and does not at all depend upon the subsequent events (*Caruthers* v. *Graham* (1811), 14 East, 578; *Couturier* v. *Hastie* (1852), 8 Exch. 40; *Harburg India Rubber Co.* v. *Martin*, [1902] 1 K. B. 778, C. A.).

(*v*) *Ionides* v. *Pacific Insurance Co.* (1871), L. R. 6 Q. B. 674, 684; affirmed (1872), L. R. 7 Q. B. 517, Ex. Ch. (where it was held that, a stamped policy being in existence, the slip might be looked at for the purpose, *inter alia*, of ascertaining the intention of the parties in preparing the policy).

(*w*) Marine Insurance Act, 1906 (8 Edw. 7, c. 41), s. 21. This was also the previous law (*Cory* v. *Patton* (1872), L. R. 7 Q. B. 304; *Cory* v. *Patton* (1874), L. R. 9 Q. B. 577 (any fresh fact coming to the knowledge of the assured after the initialling of the slip, but before the execution of the policy itself, need not be communicated to the insurers); applied, *Lishman* v. *Northern Maritime*

Apart from the provisions of the Stamp Act, 1891 (*x*) (for instance, when the contract of insurance is made in a country where no stamp laws are in force), an action may be maintained upon an agreement to issue a policy, and specific performance of it may be ordered (*y*).

SUB-SECT. 2.—*Payment of Premiums.*

Payment of premiums.

Provisions contained in the Act.

692. Unless otherwise agreed, the duty of the assured or his agent to pay the premium and the duty of the insurer to issue the policy to the assured or his agent are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium (*a*).

Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses or in respect of returnable premium (*b*).

Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker (*c*).

It follows from the above provisions that as a general rule the assured is liable to the broker for premiums as money paid, whether or not they have been paid over by the broker to the underwriter.

Insurance Co. (1875), L. R. 10 C. P. 179, Ex. Ch.). By the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 89: "Where there is a duly stamped policy, reference may be made as heretofore to the slip or covering note in any legal proceeding." See *Ionides* v. *Pacific Insurance Co.* (1871), L. R. 6 Q. B. 674, 678. As to the qualification of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 21, 89, by s. 91 (1) (a), *ibid.*, see *Glasgow Assurance Corporation* v. *Symondson & Co.* (1911), 104 L. T. 254, *per* SCRUTTON, J., at p. 258.

(*x*) 54 & 55 Vict. c. 39.

(*y*) *Bhugwandass* v. *Netherlands India Sea and Fire Insurance Co. of Batavia* (1888), 14 App. Cas. 83, P. C.; *Royal Exchange Assurance Corporation* v. *Tod* (1892), 8 T. L. R. 669.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 52. It is not easy to ascertain the effect this provision was intended to have. It seems that it cannot have any application to a policy effected at Lloyd's with individual underwriters, as, even if they can be considered as issuing a policy, it is in fact underwritten without any such tender or payment, nor can it apply to any insurance (whether by companies or at Lloyd's) in those cases in which the premium is paid or deemed to have been paid on or before effecting the policy.

(*b*) *Ibid.*, s. 53 (1).

(*c*) *Ibid.*, s. 54. Ss. 53 (1), 54 (*ibid.*), embodied the law laid down in previously decided cases; see *Power* v. *Butcher* (1829), 10 B. & C. 329, 340, 347; *Dalzell* v. *Mair* (1808), 1 Camp. 533; *De Gaminde* v. *Pigou* (1812), 4 Taunt. 246; *Airy* v. *Bland* (1774), 2 Park on Marine Insurance, 8th ed., 811; *Xenos* v. *Wickham* (1863), 14 C. B. (N. S.), 435, *per* BLACKBURN, J., at p. 456, Ex. Ch.; (1867), L. R. 2 H. L. 296, *per* Lord CHELMSFORD, L.C., at p. 319; see also *Lamont, Nisbett & Co.* v. *Hamilton*, [1907] S. C. 628; *Universo Insurance Co. of Milan* v. *Merchants Marine Insurance Co.*, [1897] 2 Q. B. 93, C. A. In the last case the policy, which was effected by a company, did not contain an acknowledgment of the receipt of the premium, and contained a promise by the assured to pay it. It is doubtful, however, whether the decision is not impliedly overruled by the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 53 (1). See also *Roberts* v. *Security Co.*, [1897] 1 Q. B. 111, C. A., and the comments on this case in *Equitable Fire and Accident Office, Ltd.* v. *The Ching Wo Hong*, [1907] A. C. 96, P. C.

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SUB-SECT. 3. —*Set-off of Premiums and Losses between Broker and Underwriter.*

Set-off of premiums and losses as between broker and underwriter.

693. A claim under a policy, whether the loss be total or partial, is a claim for unliquidated damage (*d*), so that losses and premiums could not be set off against each other under the statutes of set-off (*e*); nor are they now the subject of set-off, but by virtue of the Judicature Acts the broker, in an action brought by the insurers against him for premiums, can counterclaim, at any rate, to the extent to which he could recover on the policies for his own use and benefit (*f*).

Where the broker or the underwriter becomes bankrupt, there can be no counterclaim in an action brought by either of them against the other, inasmuch as no action can be maintained against the trustee of a bankrupt's estate for a debt due from the bankrupt (*g*). But although no counterclaim in the ordinary sense of the word can be maintained, there may be a right of set-off under the mutual credit clause of the Bankruptcy Act, 1883 (*h*), and the following are the rules of law in respect of setting off losses under that clause.

Where bankruptcy of the underwriter has intervened, and the action is brought by the trustee of the bankrupt's estate, the broker who has effected the policy in his own name and on his own account, or in his own name, but on account of his principals (provided in this last case he has also a lien on the policy to the extent of his set-off) (*i*), may set off losses allowed to him in account by the underwriter before his bankruptcy, though unadjusted; such losses being mutual credits within the meaning of those words in the Bankruptcy Act, 1883 (*j*).

But where the broker effects the policy both in the name and on account of his principal; or where, when effected in his own name, but on the principal's account, he has no lien on it, or where he effects it in his own name, but expressly on the face of the policy as agent, he has no such right of set-off. He has no such right even though he acts under a *del credere* commission, for such a

(*d*) *Castelli* v. *Boddington* (1852), 1 E. & B. 66; *Luckie* v. *Bushby* (1853), 13 C. B. 864; *Thomson* v. *Redman* (1843), 11 M. & W. 487; *Pellas* v. *Neptune Marine Insurance Co.* (1879), 5 C. P. D. 34, C. A.; and see *Swan and Cleland's Graving Dock and Slipway Co.* v. *Maritime Insurance Co. and Croshaw*, [1907] 1 K. B. 117, 123; *Baker* v. *Adam* (1910), 15 Com. Cas. 227. As to the application of R. S. C., Ord. 14, to a policy against default in payment of a sum of money, see *Dane* v. *Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, C. A.

(*e*) Stat. (1728) 2 Geo. 2, c. 22, and stat. (1734) 8 Geo. 2, c. 24; repealed by Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 4. See now R. S. C., Ord. 19, r. 3; and titles EQUITY, Vol. XIII., pp. 103, 163; SET-OFF AND COUNTERCLAIM.

(*f*) *Young* v. *Kitchin* (1878), 3 Ex. D. 127; *Newfoundland Government* v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199, P. C.

(*g*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 60.

(*h*) 46 & 47 Vict. c. 52, s. 38; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 211.

(*i*) *Davies* v. *Wilkinson* (1828), 4 Bing. 473. As to lien on the policy, see p. 351, *post*.

(*j*) 46 & 47 Vict. c. 52, s. 38. See *Grove* v. *Dubois* (1786), Term Rep. 112 (as explained by Lord ELLENBOROUGH, C.J., in *Parker* v. *Smith* (1812), 16 East, 382, at p. 386); *Koster* v. *Eason* (1813), 2 M. & S. 112; *Parker* v. *Beasley* (1814), 2 M. & S. 423.

commission, being a contract wholly between the broker and the assured, cannot affect the mutual rights and liabilities of the broker and the underwriter, and therefore does not, *per se*, entitle the broker to his right of set-off (*k*).

SUB-SECT. 4.—*Return of Premiums on Reduction of Risk.*

Return of premiums.

694. The amount of premiums ultimately payable to the underwriter may frequently depend on contingencies which cannot at once be ascertained, as for instance where it is agreed that the premium should be reduced if the ship should sail on or before a specified day, or in case of short interest. In such cases there is a returnable premium, and unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the insurer is directly responsible to the assured in respect of returnable premium (*l*).

SUB-SECT. 5.—*Insurance Agent's Lien on the Policy.*

Broker's lien on policy.

695. The policy when effected becomes the property of the assured, who may maintain trover for it subject to any lien which the broker may have for premiums and commissions or for the general balance of his insurance account (*m*).

Where the policy is left by the assured in the broker's hands, the broker has, unless otherwise agreed, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent (*n*).

Mercantile agent for foreign principal.

A person who though not an insurance broker is the mercantile agent in this country of a merchant abroad, has a lien on the policy

(*k*) *Wilson* v. *Creighton* (1782), 3 Doug. (K. B.) 132; *Cumming* v. *Forester* (1813), 1 M. & S. 494; *Koster* v. *Eason* (1813), 2 M. & S. 112; *Parker* v. *Beasley* (1814), 2 M. & S. 423; *Davies* v. *Wilkinson* (1828), 4 Bing. 573; *Lee* v. *Bullen* (1858), 8 E. & B. 692, n.; *Baker* v. *Langhorn* (1816), 4 Camp. 396; S. C. 6 Taunt. 519; *Peele* v. *Northcote* (1817), 7 Taunt. 478. These rules are (as is rightly stated in Arnould on Marine Insurance, s. 118) the result of the cases cited in this and the two preceding notes.

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 53 (1); see p. 349, *ante*. See further, as to return of premiums, p. 496, *post*. The mode in which it was customary to deal with returnable premiums as between the assured, the broker, and the underwriter, and the rules of law which were applicable in the case of the death or bankruptcy of the underwriter, are set out in Arnould on Marine Insurance, ss. 116—118. Such custom no longer exists, and returns of premium are now dealt with as losses or averages. The underwriter is credited with the initial premium, and if a return is afterwards found to be due, it is adjusted on the policy and credited to the broker, just as a loss would be adjusted or credited. It suffices, therefore, to refer to the above-mentioned sections of Arnould for the old custom and the law appertaining thereto.

(*m*) *Harding* v. *Carter* (1781), 1 Park on Marine Insurance, 8th ed., 4, *per* Lord MANSFIELD, C.J.

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 53 (2). See *Fairfield Shipbuilding and Engineering Co., Ltd.* v. *Gardner, Mountain & Co., Ltd.* (1911), 27 T. L. R. 281 (broker estopped as against real principal from setting up general

SECT. 3. **The Course of Business of Insurance.**

which he is authorised to effect, for the general balance due to him or becoming due on his account with his principal while the policy remains in his hands (*o*) or in those of an insurance broker employed by him (*p*).

Limit of general lien.

The general lien of an insurance broker or agent is, however, confined to the balance of the insurance account, and does not comprehend transactions between the broker and the assured on a distinct account having no relation to insurance, but where bankruptcy intervenes, money becoming due under such transactions may be the subject of set-off under the mutual credit clause of the Bankruptcy Act, 1883 (*q*).

Extinguishment of lien.

The lien of an insurance broker or agent, like the lien of every agent, is extinguished when he voluntarily delivers up the policy to his principal or his order, or if he parts with the policy wrongfully as by pledging it as his own, but not if it is taken from him by force or fraud or parted with by him in mistake (*r*). If after it has been parted with it comes again into the broker's possession, his particular lien revives (*s*).

If an insurance broker, having a lien on a policy, be summoned as a witness to produce it under a *subpœna duces tecum* in an action by the assured against the underwriter, he is compellable to produce the policy, but the court will, if the plaintiff obtains a verdict, prevent the money from being paid over to him until the broker's lien is satisfied (*a*).

SUB-SECT. 6.—*Settlement of Losses, and Usage of Lloyd's in respect thereof.*

Payment of losses by underwriters and usage of Lloyd's in respect thereof.

696. The assured generally leaves the policy with the broker, or hands it to him in order that he may settle the amount of loss (*b*) with the underwriter and obtain payment from him; and it seems that in such case the broker has ostensible authority to settle the loss and receive payment of the money (*c*).

lien; question whether lien on policies extended to proceeds collected thereunder left open). This statutory provision embodies the law laid down in the following cases:—see for the affirmative proposition, *Man* v. *Shiffner* (1802), 2 East, 523; *Olive* v. *Smith* (1813), 5 Taunt. 56; *Westwood* v. *Bell* (1815), 4 Camp. 349, 353; *Mann* v. *Forrester* (1814), 4 Camp. 60; *Godin* v. *London Assurance Co.* (1758), 1 Burr. 489, 493; and for the qualification, *Maanss* v. *Henderson* (1801), 1 East, 335; *Man* v. *Shiffner, supra*; *Snook* v. *Davidson* (1809), 2 Camp. 218; *Lanyon* v. *Blanchard* (1811), 2 Camp. 597, as explained in *Westwood* v. *Bell, supra*; *Cahill* v. *Dawson* (1857), 3 C. B. (N. S.) 106; *Maspons y Hermano* v. *Mildred* (1882), 9 Q. B. D. 530, 543, C. A.; affirmed *sub nom. Mildred* v. *Maspons* (1883), 8 App. Cas. 874.

(*o*) See *Godin* v. *London Assurance Co., supra.*

(*p*) *Man* v. *Shiffner, supra.*

(*q*) 46 & 47 Vict. c. 52, s. 38. See *Olive* v. *Smith, supra.* See, also, *Rose* v. *Hart* (1818), 2 Moore (C. P.), 547, 1 Smith, L. C., 11th ed., 298; and p. 350, *ante.*

(*r*) See title AGENCY, Vol. I., p. 197.

(*s*) *Levy* v. *Barnard* (1818), 8 Taunt. 149. As to whether and to what extent his general lien may revive, see 2 Duer on Marine Insurance, pp. 290, 359, 360; and see title LIENS.

(*a*) *Hunter* v. *Leathley* (1830), 10 B. & C. 858; 2 Duer on Marine Insurance, pp. 294, 297.

(*b*) As to the responsibility of the insurer to the assured for the amount payable in respect of losses, see p. 349, *ante.*

(*c*) *Xenos* v. *Wickham* (1863), 14 C. B. (N. S.) 435, Ex. Ch., *per* BLACKBURN, J., at

In the absence of an express or implied agreement to that effect, the broker has only authority to receive payment of losses in cash, and has no authority to bind the assured by a mere settlement of the loss in account between him and the underwriter (*d*). In the case, however, of Lloyd's underwriters, the claims for losses fall due seven days after they have been settled, and it is customary to carry on current accounts between the broker and the underwriters, setting off losses against premiums and passing cheques for the balance due at the end of each quarter. But as this usage is not a general one and only prevails at Lloyd's, the assured, unless proved to be cognisant of it and to have assented to it, can recover the loss against the underwriter, although the claim has, between broker and underwriter, been settled and passed into account (*e*).

On the other hand, if the assured is proved to have been apprised of the usage and to have assented to it, he is bound by it and cannot recover from the underwriter claims so settled and passed into account (*f*). But, in this case, the broker, having deprived the assured of all rights remaining against the underwriter, will be liable to the former for the amount as money had and received to his use, and will, in an action by the assured, be estopped from saying that he has not such money in his hands for the plaintiff's use (*g*).

When the broker has been expressly instructed to effect the insurance at Lloyd's, this fact may justify the inference that the assured has consented to be bound by the usage (*h*).

SUB-SECT. 7.—*Recovery back of Payments for Losses and Premiums in case of Mistake, Illegality etc.*

697. Where an underwriter has, by mistake, paid a loss to the broker to which the assured is not entitled, he may recover it back

Recovery back in case of mistake, illegality etc.

p. 464, a minority judgment which was supported on appeal (1867), L. R. 2 A. L. 296; *Sweeting* v. *Pearce* (1859), 7 C. B. (N. S.) 449; affirmed (1861), 9 C. B. (N. S.) 534, Ex. Ch.; *Scott* v. *Irving* (1830), 1 B. & Ad. 605; *Legge* v. *Byas, Mosly & Co.* (1901), 7 Com. Cas. 16. As to payment by bill, see *Hine Brothers* v. *Steamship Insurance Syndicate* (1895), 72 L. T. 79, C. A.

(*d*) *Jelt* v. *Pratt* (1817), 2 Stark. 67; *Todd* v. *Reid* (1821), 4 B. & Ald. 210; *Russell* v. *Bangley* (1821), 4 B. & Ald. 395; *Bartlett* v. *Pentland* (1830), 10 B. & C. 760, and cases cited in note (*c*), p. 352, *ante*; and see *Matvieff* v. *Crosfield* (1903), 8 Com. Cas. 120 (where it was held that *Sweeting* v. *Pearce*, *supra*, is not overruled by *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802). See also *Re Law Car and General Insurance Corporation, Ltd.*, [1911] W. N. 91; affirmed, [1911] W. N. 101, C. A. (agreement for payment of premiums into joint account and deduction of losses therefrom).

(*e*) See note (*d*), *supra*.

(*f*) *Stewart* v. *Aberdein* (1838), 4 M. & W. 211; see cases cited in note (*d*), *supra*; compare *Macfarlane* v. *Giannacopulo* (1858), 3 H. & N. 860, at p. 866; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 87, and as to the binding effect of usages, see p. 344, *ante*. This usage does not extend to dealings between brokers and insurance companies (*Hine Brothers* v. *Steamship Insurance Syndicate*, *supra*).

(*g*) *Andrew* v. *Robinson* (1812), 3 Camp. 199; *Wilkinson* v. *Clay* (1814), 6 Taunt. 110. As to estoppel by representation generally, see title ESTOPPEL, Vol. XIII., pp. 367 *et seq.*

(*h*) *Bartlett* v. *Pentland*, *supra*, at p. 770; *Stewart* v. *Aberdein*, *supra*; *Sweeting* v. *Pearce* (1861), 9 C. B. (N. S.) 534, 541, Ex. Ch.

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from the broker if the latter has not paid it over to his principal, or settled in account with him in such manner as amounts to payment (*i*). Merely passing it into account is not for this purpose equivalent to payment (*k*).

A premium paid upon an illegal insurance is not in general recoverable, though the underwriter cannot be compelled to pay the loss (*l*).

Broker's responsibility to assured for money received to his use.

It seems that an agent, to whom moneys have actually been paid to the use of a principal, cannot withhold them from him on the ground that the transaction out of which the payment arose was illegal. Therefore, where a loss has actually been paid over by the underwriter to the broker, the latter cannot, in an action for money had and received to the use of the assured, set up as a defence the illegality of the insurance (*m*). But where the money has not been paid but only allowed in account, premiums on illegal insurances may be stopped by the assured while in the hands of the broker, and the underwriter cannot recover them from the broker (*n*). Moreover, the insurance agent cannot dispute the title of his principal, and cannot, after receiving money for him in that capacity, set up that he did not so receive it, but only received it for the benefit of some other person (*o*).

SECT. 4.—*Insurance Agents.*

SUB-SECT. 1.—*Authority to Insure.*

Authority of agents to insure.

698. A person may have express or implied authority to insure on behalf of another, but unless he has such authority, he cannot recover the premium from the other person (*p*).

Authority: when implied. Partners.

699. A partner has implied authority from other members of the firm to procure an insurance to be effected for them and himself on partnership property (*q*), but this rule does not apply

(*i*) *Buller* v. *Harrison* (1777), 2 Cowp. 565; *Holland* v. *Russell* (1861), 1 B. & S. 424; (1863), 4 B. & S. 14.

(*k*) *Buller* v. *Harrison*, *supra*.

(*l*) *Lowry* v. *Bourdieu* (1780), 2 Doug. (K. B.) 468; *Allkins* v. *Jupe* (1877), 2 C. P. D. 375. For the full treatment of this subject, see pp. 501 *et seq.*, and pp. 557 *et seq.*, *post*.

(*m*) *Farmer* v. *Russell* (1798), 1 Bos. & P. 296; *De Mattos* v. *Benjamin* (1894), 63 L. J. (Q. B.) 248; *O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698; *Burge* v. *Ashley and Smith, Ltd.*, [1900] 1 Q. B. 744, C. A.

(*n*) *Edgar* v. *Fowler* (1803), 3 East, 222.

(*o*) *Roberts* v. *Ogilby* (1821), 9 Price, 269; *Dixon* v. *Hamond* (1819), 2 B. & Ald. 310. If *Bell* v. *Jutting* (1817), 1 Moore (C. P.), 155, be inconsistent with these two cases it must be considered to be overruled by them. See also *Dixon* v. *Hovill* (1828), 4 Bing. 665. By the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 91 (2), the rules of the common law relating to principal and agent apply to the case of the assured and broker. As to these rules, generally, see titles AGENCY, Vol. I., pp. 145 *et seq.*, 159; ESTOPPEL, Vol. XIII., p. 407.

(*p*) *French* v. *Backhouse* (1771), 5 Burr. 2727; and see note (*q*), *infra*. Although a person may have no authority to insure on behalf of another, still, if he does so, the latter may ratify the insurance even after the knowledge of the loss (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 86). See, further, p. 349 *ante*, and 355, *post*, and compare title AGENCY, Vol. I., pp. 173 *et seq.*

(*q*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5. As to partnership generally, see title PARTNERSHIP.

to part owners (*r*) unless they are jointly interested in the particular adventure insured in such a manner as to be partners therein (*s*).

Part owners.

A consignor or commission agent to whom funds are remitted for the purpose of purchasing and shipping goods for his employer has not, merely as consignor, an implied authority to insure the goods on behalf of his principal, but such authority can be inferred from the established course of dealing between the two parties or by the usage of a particular trade (*t*).

Consignor or commission agent.

As regards the consignee, he has not, merely as consignee, implied authority to insure on behalf of the consignor, and cannot therefore charge him with the premiums (*a*). But where he has made advances on the goods consigned to him, he acquires authority to insure them, and can effect a policy to the amount of the insurable value, and then, by alleging the interest in himself and his consignor, he can recover the whole amount from the underwriters (*b*).

Consigning.

When advances made by consignee.

700. An authority to insure may generally be revoked at any time before a binding contract of insurance has been entered into (*c*).

Revocation of authority.

SUB-SECT. 2.—*Duty to Insure.*

701. The next question to be considered is, whether a person to whom an order to insure has been transmitted is bound to accept such order, and is liable if he does not duly comply with it. On this subject the following rules have been laid down (*d*) :—

Obligation to insure.

(1) Where a merchant abroad has effects in the hands of his

(*r*) *Bell* v. *Humphries* (1818), 2 Stark. 345; *Roberts* v. *Ogilby* (1821), 9 Price, 269, 282.

(*s*) *Robinson* v. *Gleadowe* (1835), 2 Bing. (N. C.) 156.

(*t*) 2 Duer on Marine Insurance, pp. 101, 104.

(*a*) *Ibid.*, pp. 107, 108.

(*b*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 14 (2); 2 Duer on Marine Insurance, p. 106; *Wolff* v. *Horncastle* (1798), 1 Bos. & P. 316; *Carruthers* v. *Sheddon* (1815), 6 Taunt. 14; *Crauford* v. *Hunter* (1798), 8 Term Rep. 13, 23; *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L. R. 8 C. P. 596. In *Cornwal* v. *Wilson* (1750), 1 Ves. Sen. 509, Lord HARDWICKE, L.C., at p. 511, expressed an opinion that a merchant who has ordered goods from a foreign correspondent, if he justifiably refuses to receive them and elects to reship, has an implied authority to insure them on behalf of the consignor. It is submitted, however, that this opinion is probably incorrect, since the consignee in such case is not bound to reship, and need only give the consignor notice of his refusal to accept the goods (see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 36; and title SALE OF GOODS).

(*c*) It seems, however, extremely doubtful whether a revocation would be effective after an insurance slip or covering note has been signed. See p. 348, *ante*. If the authority to insure is given for the purpose of being, or as part of, the security of a consignee who has made advances, such authority may be irrevocable within the principles laid down in *Smart* v. *Sandars* (1848), 5 C. B. 895, 917, 918. See title AGENCY, Vol. I., p. 228.

(*d*) *Smith* v. *Lascelles* (1788), 2 Term Rep. 187, *per* BULLER, J., at pp. 188—190; 2 Duer on Marine Insurance, pp. 124, 125, 127, 128. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32 (3), enacts that unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit. As to carriage by sea, see title SHIPPING AND NAVIGATION.

SECT. 4. Insurance Agents.

agent or correspondent here, he has a right to expect that the agent will comply with an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases.

(2) Where the merchant abroad has no effects in the hands of his correspondent here, but the course of dealing between them has been such that the one has been used to send orders for insurance and the other to execute them, the former has a right to expect that his orders for insurance will still be obeyed unless the latter gives him notice to discontinue that course of dealing.

(3) Where the merchant abroad sends bills of lading to his correspondent here with an order to insure as the implied condition on which he is to accept the bills of lading, and the correspondent accepts the bills of lading, he must obey the order, for it is one entire transaction, and the acceptance of the bills of lading amounts to an implied agreement to perform the condition (*e*).

Or to give notice of non-compliance.

702. Where the merchant abroad has, under the first and second of the above-mentioned rules, a right to expect that his order to insure will be complied with, it is the duty of the agent, if he does not intend to accept the order, to give prompt notice to the merchant, so that the latter may have the opportunity of effecting the insurance elsewhere, and if in consequence of his failure to give due notice no insurance be effected, the agent will be answerable for the loss arising from his default (*f*).

SUB-SECT. 3.—*Duty to use due Care.*

Liability of insurance agent.

703. The liability of an insurance agent to his employer is determined by the principles of the law of agency (*g*). As to these, it is sufficient here to make the following general statement:—

A person who, voluntarily and without any kind of consideration, promises to procure an insurance is not liable to an action for non-feasance, because there is no consideration for his promise; but if he in fact enters upon the performance of his undertaking, he is legally bound to use due care and skill in relation thereto (*h*).

Exercise of due care and skill.

All agents, whether paid or unpaid, skilled or unskilled, are under a legal obligation to exercise due care and skill in performance of the duties which they have undertaken, a greater degree of care being required from a paid than from an unpaid, and from a skilled than from an unskilled, agent. The question in all such

(*e*) See note (*d*), p. 355, *ante*.

(*f*) *Smith* v. *Lascelles* (1788), 2 Term Rep. 187; *Smith* v. *Price* (1862), 2 F. & F. 748 (measure of damages); compare *Prince* v. *Clark* (1823), 1 B. & C. 186, 189; see also *Callander* v. *Oelrichs* (1838), 5 Bing. (N. C.) 58, and the criticism of that case in 2 Duer on Marine Insurance, pp. 222—225.

(*g*) See title AGENCY, Vol. I., p. 185.

(*h*) If a man after taking a trust upon himself miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing (*Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, *per* HOLT, C.J., at p. 919; 1 Smith, L. C., 11th ed., 173, 187). See also *Wilkinson* v. *Coverdale* (1793), 1 Esp. 75, following *Wallace* v. *Tellfair* (1786), 2 Term Rep. 188, n., where the principle was applied to insurance agency, and title AGENCY, Vol. I., p. 185.

cases is whether the act or omission complained of is inconsistent with that reasonable degree of care and skill which persons of ordinary prudence and ability might be expected to show in the situation and profession of the agent (*i*).

Presumed qualifications.

Every insurance broker is assumed to be skilled in matters relating to insurance and to know the ordinary well-settled rules of insurance law (*j*). He will, therefore, be held liable if he fails to communicate to the underwriter the time of the ship's sailing or any other information which may be material (*k*). He is further bound to know all the details necessary to make the policy a legally valid instrument (*l*), and to insert in the policy the ordinary risks and such customary clauses as are proper in respect of the insured voyage (*m*).

Duty to obey orders of principal.

The agent is, of course, bound to obey the express orders of his principal (*n*), but if those orders are so ambiguous as to be reasonably susceptible of two distinct meanings and the agent *bonâ fide* acts upon one of them, he will, according to the ordinary laws of agency, be held justified in so doing and will be exempt from liability (*o*).

Insurance broker only agent of assured.

704. A broker who effects an insurance with an underwriter is not his agent, and is under no legal liability to him to use care or skill in effecting the insurance (*p*).

Admissibility of evidence of experts as to want of due care and skill.

705. The question whether an insurance broker has exercised reasonable care or skill is a question of fact (*q*), but there are two conflicting decisions as to the admissibility of the evidence of persons engaged in the same business as to what would have been in the circumstances the conduct of a broker of reasonable care and skill (*r*). It is submitted that (*s*) such evidence is admissible.

(*i*) *Chapman* v. *Walton* (1833), 10 Bing. 57, *per* TINDAL, C.J., at p. 63; and see *Hurrell* v. *Bullard* (1863), 3 F. & F. 445.

(*j*) *Chapman* v. *Walton*, *supra*, *per* TINDAL, C.J.

(*k*) *Maydew* v. *Forrester* (1814), 5 Taunt. 615; *Wake* v. *Atty* (1812), 4 Taunt. 493. See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 19, 20.

(*l*) *Turpin* v. *Bilton* (1843), 5 Man. & G. 455; see, however, *Wake* v. *Atty*, *supra*.

(*m*) *Mullough* v. *Barber* (1815), 4 Camp. 150; *Park* v. *Hamond* (1815), 4 Camp. 344; compare *Comber* v. *Anderson* (1808), 1 Camp. 523; *Moore* v. *Mourgue* (1776), 2 Cowp. 479.

(*n*) *Yuill & Co.* v. *Robson*, [1908] 1 K. B. 270, C. A.; *Glaser* v. *Cowie* (1813), 1 M. & S. 52.

(*o*) *Fomin* v. *Oswell* (1813), 3 Camp. 357; *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395; compare *Yuill & Co.* v. *Robson*, *supra*; and see *Moore* v. *Mourgue*, *supra*; *Comber* v. *Anderson*, *supra*.

(*p*) *Empress Assurance Corporation* v. *Bowring & Co.* (1905), 11 Com. Cas. 107; *Glasgow Assurance Corporation* v. *Symondson & Co.* (1911), 104 L. T. 254.

(*q*) *Hurrell* v. *Bullard*, *supra*.

(*r*) *Campbell* v. *Rickards* (1833), 5 B. & Ad. 840, in which case such evidence was held to be inadmissible; *Chapman* v. *Walton*, *supra*, in which case it was held admissible.

(*s*) By analogy to the practice in admitting evidence as to what are material facts to be disclosed (see title EVIDENCE, Vol. XIII., p. 480), and in accordance with the principles laid down by TINDAL, C.J., in *Chapman* v. *Walton*, *supra*.

SECT. 4. Insurance Agents.

In action for negligence damage must be proved.

706. In order to maintain an action against an insurance agent, the principal must not only prove that the agent was in default, but must also establish that he has sustained damage by reason of such default. If the insurance ordered by the assured is an illegal insurance, no action will lie against the agent for not effecting it (*t*), and if the underwriters could have successfully resisted a claim under the policy on the ground of breach of an express or implied warranty, deviation (*a*), or the like, the principal cannot recover damages from the agent for not effecting the policy, nor for negligence in reference thereto, unless perhaps it be clearly shown that the underwriter would not have availed himself of any such defence. But an agent is never allowed to take advantage of any defence founded on his own wrongful act or default (*b*).

SUB-SECT. 4.—*Duty after effecting the Policy.*

Duty of agent after he has effected the policy.

707. If the policy, after being effected, is left in the hands of the insurance agent, it is generally his duty to settle the loss with the underwriters, and to collect the various sums due from them and pay them over to his principal, and if he does not use due care and diligence in these matters he will be responsible to his principal for the loss the latter may sustain by reason of such default (*c*).

The agent may have express or implied authority, and it may become his duty, to give notice of abandonment in case of a constructive total loss, and in such case he is bound to use reasonable care and diligence, and in default will become liable to his principal for damage resulting from such notice not having been given (*d*).

A broker has, in the absence of the express authority of his principal, no authority to cancel a policy whether it be left in his hands or not (*e*).

(*t*) *Webster* v. *De Tastet* (1797), 7 Term Rep. 157; *Glaser* v. *Cowie* (1813), 1 M. & S. 52.

(*a*) *Delany* v. *Stoddart* (1785), 1 Term Rep. 22; 2 Duer on Marine Insurance, p. 325; 2 Phillips, Law of Insurance, s. 1904.

(*b*) The measure of damages for non-insurance is that which would have been recovered from the underwriters (*Smith* v. *Price* (1862), 2 F. & F. 748, *per* ERLE, C.J., at p. 752), but in accordance with the ordinary principles of agency, an insurance agent may be liable for the costs of a previous action which the assured has brought against the underwriter with the agent's desire or concurrence (*Maydew* v. *Forrester* (1814), 5 Taunt. 615).

(*c*) In *Xenos* v. *Wickham* (1863), 14 C. B. (N. S.) 435, Ex. Ch., BLACKBURN, J., at p. 464, says: "Perhaps it may be put as high as to say that the broker is clothed with authority to do all that is incidentally necessary to carry out the contract in the policy left in his hands; see *Richardson* v. *Anderson* (1805), 1 Camp. 43, n.; *Goodson* v. *Brooke* (1815) 4 Camp. 103. I do not wish to be understood as giving a decided opinion that he has so much authority, but there are at least grounds for so contending (*Bousfield* v. *Creswell* (1810), 2 Camp. 545)"; and see p. 352, *ante*.

(*d*) *Comber* v. *Anderson* (1808), 1 Camp, 523 (sequel to *Anderson* v. *Royal Exchange Assurance Co.* (1805), 7 East, 38), where duty to give notice was not established.

(*e*) *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296, reversing, but not on this point, *Xenos* v. *Wickham* (1863), 14 C. B. (N. S.) 435, Ex. Ch.

SUB-SECT. 5.—*Agents to subscribe Policies.* SECT. 4. Insurance Agents.

708. An agent may be appointed not only for the purpose of effecting sea policies for the assured, but also for the purpose of subscribing them for the underwriters (*f*). Agents to subscribe policies.

The agent's authority is generally limited by the terms and conditions contained in the agreement by which he is appointed agent; and if it is common knowledge in the place where the policy is effected that agents who subscribe for a principal have only a limited authority, such knowledge must be imputed to the assured, and the latter cannot recover from the principal if the agent has exceeded his actual authority (*g*). Limit of authority.

On the other hand, if the agent has not exceeded such actual authority, the principal is liable, although the agent is fraudulently acting for his own benefit and not that of his principal, provided always that the assured has no knowledge of the fraud and is acting *bonâ fide* (*h*).

An agent who has authority to subscribe a policy has implied authority, and is also bound to perform any subsequent act on behalf of his principal that may be rendered necessary by the relation between the latter and the assured, such as, for instance, the authority to sign the adjustment of a loss (*i*). Extent of authority.

It has already been observed (*j*) that Lloyd's agents are not the agents of the underwriters, and have, therefore, no authority to make or sign any adjustment of the loss or accept an abandonment as the representative of the underwriter (*k*). Lloyd's agents.

SECT. 5.—*Who can avail himself of the Assurance.*

SUB-SECT. 1.—*Description in the Policy of the Assured.*

709. A marine policy must specify the name of the assured or some person who effects the insurance on his behalf (*l*). Description of the assured or his agent.

From the introductory clause of Lloyd's policy (*m*) it is apparent that the policy may be effected in the name either of the assured, or of the broker, or of an agent of the assured whether or not he employs a broker. Such broker or agent need not, however, be described in the policy as broker or agent, and the action on the policy may be brought either in the name of the assured or in that of such broker or agent (*n*).

(*f*) *Neal* v. *Irving* (1793), 1 Esp. 61; *Mason* v. *Joseph* (1804), 1 Smith, K. B. 406; *Courteen* v. *Touse* (1807), 1 Camp. 43; *Haughton* v. *Ewbank* (1814), 4 Camp. 88; *Guthrie* v. *Armstrong* (1822), 1 Dow. & Ry. (K. B.) 248; *Brockelbank* v. *Sugrue* (1831), 5 C. & P. 21; *Mead* v. *Davison* (1835), 3 Ad. & El. 303.

(*g*) *Baines* v. *Ewing* (1866), L. R. 1 Exch. 320.

(*h*) *Hambro* v. *Burnand*, [1904] 2 K. B. 10, C. A., overruling the judgment of BIGHAM, J., in S. C., [1903] 2 K. B. 399. As to the continuance by estoppel of an authority after its expiration, see *Willis, Faber & Co., Ltd.* v. *Joyce* (1911), 104 L. T. 576; and title ESTOPPEL, Vol. XIII., p. 390; and as to agency in general, see title AGENCY, Vol. I., pp. 145 *et seq.*

(*i*) *Richardson* v. *Anderson* (1805), 1 Camp. 43, n.

(*j*) See note (*i*), p. 339, *ante*.

(*k*) See *Drake* v. *Marryat* (1823), 1 B. & C. 473, *per* Lord TENTERDEN, C.J., at p. 477.

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 23.

(*m*) See note (*p*), p. 340, *ante*.

(*n*) *Wolff* v. *Horncastle* (1798), 1 Bos. & P. 316; *Bell* v. *Gilson* (1798), 1 Bos. & P.

SECT. 5.

Who can avail himself of the Assurance.

SUB-SECT. 2.—*Ratification of Insurance.*

Ratification of the policy.

710. Where a contract of marine insurance is in good faith effected by one person on behalf of another, the latter may ratify the contract even after he is aware of the loss (*o*). Thus, where a merchant after the loss hears that a policy has been effected on his behalf though without his authority, he can at any time ratify the insurance and sue upon the policy (*p*). The general rule is, however, subject to the condition that a person cannot avail himself of the policy, unless it was intended *bonâ fide* to protect his interest, or at any rate to protect the interest generally of the parties who should appear ultimately to be concerned (*q*). If, therefore, a policy was effected by A. to protect the interest only of B., no third person, C., would be allowed to avail himself of such a policy (*r*).

SUB-SECT. 3.—*Assignment of Policies.*

Assignment of policy.

711. A marine policy is not an incident to the property insured; accordingly a transfer of the property insured does not *per se* affect the transfer of a policy to the assignee (*s*).

If, therefore, the assured parts with the whole of his interest in the insured property (*t*) before the loss without assigning the policy of insurance and without an agreement to assign or hold it for the benefit of the transferee, the policy becomes unavailable to anyone (*a*). On the other hand, if at the time of the transfer of the

345; *De Vignier* v. *Swanson* (1798), 1 Bos. & P. 346, n.; *Provincial Insurance Co. of Canada* v. *Leduc* (1874), L. R. 6 C. P. 224.

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 86.

(*p*) *Williams* v. *North China Insurance Co.* (1876), 1 C. P. D. 757, 767, 770, C. A.; *Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485; *Lucena* v. *Craufurd* (1808), 1 Taunt. 325, H. L.; *Routh* v. *Thompson* (1811), 13 East, 274; *Barlow* v. *Leckie* (1819), 4 Moore (C. P.), 8. Ratification after loss is peculiar to marine insurance (*Grover and Grover* v. *Mathews* (1910), 26 T. L. R. 411, 412).

(*q*) 2 Duer on Marine Insurance, pp. 30, 135; see cases cited in note (*p*), *supra*.

(*r*) It is to be observed that the policy is, on the face of it, effected on behalf of the assured and all other parties interested, and that, therefore, the rule as to ratification of insurance is consistent with the principle laid down in *Keighley, Maxsted* v. *Durant & Co.*, [1901] A. C. 240. On the subject of ratification, see *Routh* v. *Thompson*, *supra*, explaining, at p. 281, *Routh* v. *Thompson* (1809), 11 East, 428; *Grant* v. *Hill* (1812), 4 Taunt. 380; *Irving* v. *Richardson* (1831), 2 B. & Ad. 193; *Watson* v. *Swann* (1862), 11 C. B. (N. S.) 756; *Scott* v. *Globe Marine Insurance Co., Ltd.* (1896), 1 Com. Cas. 370; *Small* v. *United Kingdom Marine Mutual Insurance Association*, [1897] 2 Q. B. 42; *Byas* v. *Miller* (1897), 3 Com. Cas. 39; see especially Lord LOREBURN'S judgment in *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.*, [1906] A. C. 336, 339.

(*s*) The Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 51, provides that where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect. But this provision does not affect a transmission of interest by operation of law (*ibid.*).

(*t*) *Secus*, if he parts only with some portion of his interest, as, *e.g.*, where he only pledges or mortgages the insured property (*Hibbert* v. *Carter* (1787), 1 Term Rep. 745; *Alston* v. *Campbell* (1779), 4 Bro. Parl. Cas. 476).

(*a*) *North of England Oil-cake Co.* v. *Archangel Insurance Co.* (1875), L. R. 10 Q. B. 249.

SECT. 5. Who can avail himself of the Assurance.

insured property the transferor assigns the policy, or agrees to assign it or to hold it for the benefit of the transferee, the latter has always been entitled to maintain an action on the policy in the name of the assured (*b*), and this could be done even if the assured had become a bankrupt after the assignment (*c*).

When assignee entitled to sue in his own name.

Where a marine policy has been assigned so as to pass the beneficial interest in it, the assignee is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected (*d*).

Assignment before or after loss.

A marine policy is assignable either before or after loss unless it contains terms expressly prohibiting assignment (*e*), and it may be assigned by indorsement thereon or in any other customary manner (*f*).

The assignee of a policy can only avail himself of the insurance to the extent to which the assured has agreed to assign his rights to him (*g*).

SECT. 6.—*Subject-matter Insured and its Description in the Policy.*

SUB-SECT. 1.—*Designation of the Ship.*

Specifying the ship in the policy.

712. As the subject-matter must be designated in a marine policy with reasonable certainty, regard, however, being had to any usage regulating the designation (*h*), the name of the ship

(*b*) *Powles* v. *Innes* (1843), 11 M. & W. 10; *Sparkes* v. *Marshall* (1836), 2 Bing. (N. C.) 761, 774; *Gibson* v. *Winter* (1833), 5 B. & Ad. 96 (assignee suing in assignor's name is subject to all rights of defence that can be raised against the assignor).

(*c*) *Castelli* v. *Boddington* (1853), 1 E. & B. 66, 879, Ex. Ch.

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 50 (2), re-enacting with slight modification the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), s. 1. The claim under the policy being unliquidated, a set-off of premiums due from the assignor is not an available defence under this section (*Pellas* v. *Neptune Marine Insurance Co.* (1879), 5 C. P. D. 34, C. A.; *Castelli* v. *Boddington*, *supra*; and see *Baker* v. *Adam* (1910), 15 Com. Cas. 227).

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 50 (1); *Lloyd* v. *Fleming* (1872), L. R. 7 Q. B. 299; *Swan and Cleland's Graving Dock and Slipway Co.* v. *Maritime Insurance Co. and Croshaw*, [1907] 1 K. B. 116, 123 (assignment of claim without assigning policy). See *Pyman* v. *Marten* (1907), 24 T. L. R. 10, C. A., for a clause prohibiting assignment. Unless a policy imposes such a condition, the consent of the underwriter is never necessary to the validity of the assignment. For a case in which the policy imposed such a condition, see *Laurie* v. *West Hartlepool Thirds Indemnity Association and David* (1899), 4 Com. Cas. 322.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 50 (3). It seems that mere delivery is not a "customary manner" (*Baker* v. *Adam*, *supra*, *per* HAMILTON, J., at p. 230).

(*g*) *Ionides* v. *Harford* (1859), 29 L. J. (EX.) 36; *Strass* v. *Spillers and Bakers, Ltd.* (1911), 104 L. T. 284; compare *Ralli* v. *Universal Marine Insurance Co.* (1862), 4 De G. F. & J. 1, C. A.; *Landauer* v. *Asser*, [1905] 2 K. B. 184.

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 26; and see p. 363, *post*. Clause 5 in Lloyd's policy (see note (*p*), p. 340, *ante*) describing in general words

SECT. 6. Subject-matter Insured etc.

in which the insured voyage is to be performed must generally be specified in the policy.

As the insertion of the name of the ship is only required for the purpose of identifying her, an error in the name is immaterial if it is shown that the underwriters intended the policy to cover the ship on which the loss actually occurred (*i*).

Error in name.

Usual clause.

Accordingly the policy usually contains the clause "or by whatsoever other name or names the ship may be called."

SUB-SECT. 2.—*Floating Policies.*

Floating policies.

713. In many cases the assured does not know on what ship or ships the insured goods have been or may be loaded, and he consequently effects what is called a floating policy.

Definition.

A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration (*k*).

Subsequent declaration.

The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner (*k*).

Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith (*k*).

Unless the policy otherwise provides, where a declaration of value is not made until after loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration (*k*).

What a floating policy covers.

714. A floating policy on goods "on board ship or ships" covers goods loaded at any port within the limits of the insured voyage (*l*). But a declaration under a floating policy will not make

the subject insured has very rarely any effect, because the actual subject-matter of the insurance is always designated in the foot or margin of the policy or in the valuation clause (see p. 378, *post*), the effect of which is to substitute this designation for the above-mentioned general clause.

(*i*) *Le Mesurier* v. *Vaughan* (1805), 6 East, 382; *Clapham* v. *Cologan* (1813), 3 Camp. 382, 383; *Ionides* v. *Pacific Insurance Co.* (1872), L. R. 7 Q. B. 517, Ex. Ch. The name of the ship carries no warranty of nationality (*Clapham* v. *Cologan*, *supra*; *Dent* v. *Smith* (1869), L. R. 4 Q. B. 414). The name of the master (see clause 6 of Lloyd's policy, note (*p*), p. 340, *ante*) need not be stated in the policy; and there is no implied condition that he should be correctly named, or that the same master should be in command throughout the voyage; Arnould on Marine Insurance, s. 174.

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 29, which embodies the law laid down in *Robinson* v. *Touray* (1811), 3 Camp. 158; *Harman* v. *Kingston* (1811), 3 Camp. 150; *Hunter* v. *Leathley* (1830), 10 B. & C. 858; *Gledstanes* v. *Royal Exchange Assurance* (1864), 5 B. & S. 797; *Stevens* v. *Australasian Insurance Co.* (1872), L. R. 8 C. P. 18; and overrules the decisions in *Kewley* v. *Ryan* (1794), 2 Hy. Bl. 343; *Henchman* v. *Offley* (1782), 2 Hy. Bl. 345, n.; and the corresponding *dicta* of BLACKBURN, J., in *Ionides* v. *Pacific Insurance Co.* (1871), L. R. 6 Q. B. 674, 682.

(*l*) *Hunter* v. *Leathley*, *supra*.

the policy attach, if the declaration is made dishonestly (*m*), or if the floating policy was not intended to cover the interest of the assured in the property which is the subject of the declaration (*n*).

SECT. 6. Subject-matter Insured etc.

SUB-SECT. 3.—*Transhipment of Goods.*

Transhipment of goods.

715. It is an implied condition in the policy that the ship named therein shall not after the commencement of the risk be changed without necessity or the consent of the underwriters. On the other hand (*o*) where, by a peril insured against, the voyage is interrupted at an intermediate port or place, in such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and reshipping the goods or other moveables, or in transhipping them and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment (*o*).

Marine Insurance Act.

SUB-SECT. 4.—*Subject-matter: How specified.*

As to specifying the goods, freight etc. in the policy.

716. The subject-matter insured must be designated in a marine policy with reasonable certainty (*p*).

The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy (*p*).

Where the policy designates the subject-matter insured in general terms, it must be construed to apply to the interest intended by the assured to be covered (*p*).

In the application of these provisions, regard must be had to any usage regulating the designation of the subject-matter insured.

Notwithstanding the general words in clause 5 of Lloyd's policy (*q*), when the insurance is intended to be confined to the ship alone, this is generally effected by inserting, either at the foot or margin of the policy, the words "on ship," or by stating in the valuation clause that, as between the assured and underwriters on the particular policy, the subject of insurance is agreed to be the ship, or as many sixty-fourth shares thereof as the assured owns. The effect of either mode of specifying the subject of insurance is to obliterate all such other words of the general form as are inapplicable to the specified subject (*r*).

What is included in "ship."

717. The term "ship" includes the hull, materials, and outfit, stores and provisions for the officers and crew, and in the case of vessels engaged in a special trade, the ordinary fittings requisite for

(*m*) *Rivaz* v. *Gerussi* (1880), 6 Q. B. D. 222, C. A.

(*n*) *Scott* v. *Globe Marine Insurance Co.* (1896), 1 Com. Cas. 370.

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 59. It is justly stated in a note to Arnould on Marine Insurance, s. 191, that the words of this provision imply that where the transhipment is made necessary by a peril not insured against, the liability of the insurer does not continue; the provision seems to impose a restriction upon the right to recover on the policy for which before the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), there was no authority. As to the effect of a clause permitting transhipment, see p. 387, *post*.

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 26.

(*q*) See note (*p*), p. 340, *ante*.

(*r*) *Robertson* v. *French* (1803), 4 East, 130, 140, 141; compare *Simonds* v. *Hodgson* (1829), 6 Bing. 114.

SECT. 6. Subject-matter Insured etc.

the trade, and also in the case of a steamship, the machinery, boilers, coals and engine stores, if owned by the assured (*a*).

As regards "goods."

718. The term "goods" means goods in the nature of merchandise, and does not include personal effects, whether belonging to the master or passengers (*b*), nor food or stores on board (*c*), and in the absence of any usage to the contrary deck cargo and living animals must be insured specifically and not under the general designation of goods (*d*). The term includes money, bullion, or jewels if put on board as merchandise, but does not comprise jewels, ornaments, cash etc. not intended for trade and carried about or belonging to persons on board (*e*); and it probably does not include banknotes or bills of exchange (*f*).

A policy on goods will cover successive cargoes on board the same ship in the course of the insured voyage (*g*). So, in whaling voyages, the term "goods" will cover the homeward-bound cargo resulting from the fishing adventure, such as the oil, whalebone etc. taken in the fishery (*h*).

But where the goods insured are actually specified in the policy (*i*), it will not attach on any goods which do not answer the description given; for instance, an insurance on "piece goods" would not cover hats (*k*).

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 15; see s. 30 (2) (*ibid.*). In whaling voyages the term "outfit" includes the fishing stores of the ship employed, that is to say, all the instruments and apparatus necessary for taking the fish and preparing and bringing home the proceeds (*Hill* v. *Patten* (1807), 8 East, 373, 375). Before the Marine Insurance Act, 1906 (6 Edw. 7. c. 41), it was decided in accordance with the general custom of whaling voyages that outfits in this sense of the term were not protected by a general insurance in the ordinary form on the body tackle, apparel etc. of the ship, and it would seem this would still continue to be the case since the Act (see s. 26 (4), *ibid.*), if such custom still exists (*Hoskins* v. *Pickersgill* (1783), 3 Doug. (K. B.) 222; *The Dundee* (1823), 1 Hag. Adm. 109, 123; *Gale* v. *Laurie* (1826), 5 B. & C. 156, 164). As to the meaning of the term "furniture" in a time policy on ship employed in the grain trade, see *Hogarth* v. *Walker*, [1900] 2 Q. B. 283, C. A. It is submitted that in the absence of any custom the question raised in the above-cited cases would now be determined by the application of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 15. As to whether a time policy on ship would cover her bunker coal and stores, see *Roddick* v. *Indemnity Mutual Marine Insurance Co.*, [1895] 1 Q. B. 836; affirmed, [1895] 2 Q. B. 380, C. A. Such a policy on "hull and machinery" does not (*ibid.*).

(*b*) For an insurance on such effects, see *Duff* v. *Mackenzie* (1857), 3 C. B. (N. S.) 16.

(*c*) *Brown* v. *Stapyleton* (1827), 4 Bing. 119, 122; compare *Hill* v. *Patten* (1807), 8 East, 373.

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 17. The latter part of the rule, which applies even to goods usually carried on deck, simplifies, and to some extent alters, the law on this subject as it stood before the Act. On this subject see *Da Costa* v. *Edmunds* (1815), 4 Camp. 142; *Apollinaris Co.* v. *Nord Deutsche Insurance Co.*, [1904] 1 K. B. 252.

(*e*) *Brown* v. *Stapyleton*, *supra*.

(*f*) *Palmer* v. *Pratt* (1824), 2 Bing. 185, 191, 192.

(*g*) *Hill* v. *Patten*, *supra*; *Tobin* v. *Harford* (1863), 13 C. B. (N. S.) 791, 802; affirmed (1864), 17 C. B. (N. S.) 528, 537, Ex. Ch.

(*h*) *Hill* v. *Patten*, *supra*.

(*i*) See, for instance, *De Symonds* v. *Shedden* (1800), 2 Bos. & P. 153; *Brown Brothers* v. *Fleming* (1902), 7 Com. Cas. 245.

(*k*) *Hunter* v. *Prinsep* (1806), 1 Marshall, Marine Insurance, 4th ed., p. 255;

719. Certain interests must be specifically insured, and are not included in the general denomination of goods on ship.

As to "freight."

Freight must be insured *eo nomine* in the policy, and this is generally done by inserting the words "on freight" at the foot or in the margin of the instrument (*l*). The term "freight," when used in a policy to denote the subject-matter insured, includes not only money payable to the shipowner for the carriage of goods, but also any benefit derived by him from the employment of the ship, such as money paid by the charterer for the hire of the ship, or the benefit derived by the shipowner by the carriage of his own goods (*m*).

Passage money.

Passage money, *i.e.*, money paid by the passenger before sailing, is not, however, covered by a policy on freight unless the terms of the particular policy necessitate a different construction (*n*).

Advance freight.

720. The charterer may insure money advanced in part payment of freight, if, but only if, the advance be not repayable in case of loss (*o*), and he may do so by an insurance on freight, although the more usual course is to insure it specifically as advances on account of or against freight (*p*).

As to profits.

721. Expected profits, for instance the profits which a purchaser of goods "to arrive" would make if the goods arrived safely at the port of destination, are not covered by an insurance on goods, but must be insured specifically as profits (*q*).

compare *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. 499, C. A.

(*l*) See, for instance, *Griffiths* v. *Bramley-Moore* (1878), 4 Q. B. D. 70, C. A. As to the meaning of an insurance on "freight chartered and/or as if chartered on board or not on board," see *The Bedouin*, [1894] P. 1, 12, C. A.; *Williams & Co.* v. *Canton Insurance Office, Ltd.*, [1901] A. C. 462.

(*m*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 90 (repeated *ibid.*, Sched. I., r. 16), provides that "'freight' includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money." See the following cases as illustrations:—*Winter* v. *Haldimand* (1831), 2 B. & Ad. 649; *Forbes* v. *Aspinall* (1811), 13 East, 323, *per* Lord ELLENBOROUGH, at p. 325; *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45; *Devaux* v. *J'Anson* (1839), 5 Bing (N. C.) 519. Where an "open cover" or slip provided that the policy was to cover "Invoice cost plus freight and insurance, etc," it was held that the word "freight" meant freight which, at the time of the loss, the assured had paid or had become liable to pay, and did not denote freight payable on delivery of the cargo at the port of destination (*Kung* v. *Methuen* (1907), 24 T. L. R. 145, C. A.).

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 90, 30 (2), Sched. I., r. 16; *Denoon* v. *Home and Colonial Assurance Co.* (1872), L. R. 7 C. P. 341.

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 12. A loan on account of freight, repayable absolutely, whether or not there be a loss of ship or goods, does not constitute an insurable interest (see *Allinson* v. *Bristol Marine Insurance Co.* (1876), 1 App. Cas. 209, 229, and p. 370, *post*).

(*p*) *Hall* v. *Janson* (1855), 4 E. & B. 500; *Wilson* v. *Martin* (1856), 11 Exch. 684; *Williams* v. *North China Insurance Co.* (1876), 1 C. P. D. 757, 761, C. A.; *Allinson* v. *Bristol Marine Insurance Co., supra*; and see *Currie & Co.* v. *Bombay Native Insurance Co.* (1869), L. R. 3 P. C. 72; *Thames and Mersey Marine Insurance Co.* v. *Pitts, Son, and King*, [1893] 1 Q. B. 476. On this point see, further, p. 370, *post*.

(*q*) A policy on profits with the clause "beginning the adventure from the loading of the goods" will cover only the profit on goods which are actually shipped (*M'Swiney* v. *Royal Exchange Assurance* (1850), 14 Q. B. 634, 646,

SECT. 6. Subject-matter Insured etc.

Commissions to arise from the sale of goods are, like profits, an interest in the goods themselves, but such commissions are not covered by an insurance on goods. They must be specifically insured (*r*).

As to bottomry and *respondentia*.

722. Loans on bottomry and *respondentia* give rise to a maritime risk, and may be the subject of insurance by the lenders.

These interests must, however, be specifically described in the policy, and cannot be insured under the general designation of ship or goods (*s*), unless it be shown to be the usage of any particular trade to insure them under such a general designation (*t*).

As to disbursements.

723. A policy on disbursements will cover an advance of freight for the ship's purposes, or an expenditure on coal, engine-room stores and port charges (*u*).

SUB-SECT. 5.—*Nature and Extent of Interest need not be specified.*

As to reinsurance and the interest of carriers.

724. The nature and extent of the interest of the assured in the subject-matter insured need not, as a general rule, be specified in the policy, unless there be a usage making it necessary (*a*). Thus in a contract of reinsurance it is sufficient to designate the subject-matter as being ship or goods etc. without describing the contract as one of reinsurance (*b*). And a policy on goods will cover the interest of carriers on goods so as to protect them against liability to the owner for the loss of the goods (*c*).

SECT. 7.—*Insurable Interest.*

SUB-SECT. 1.—*Definition.*

Insurable interest.

725. The Act does not profess to give an exhaustive definition of insurable interest (*d*), but, subject to the provisions of the Act,

Ex. Ch.; *Halhead* v. *Young* (1856), 6 E. & B. 312), but a policy may be so framed as to cover profits in respect of goods before they are put on board (*M'Swiney* v. *Royal Exchange Assurance* (1850), 14 Q. B. 634, 660, Ex. Ch.). See also *Wilson* v. *Jones* (1867), L. R. 2 Exch. 139, *per* WILLES, J., at pp. 146, 147; *Wyllie* v. *Povah* (1907), 12 Com. Cas. 317.

(*r*) *Lucena* v. *Craufurd* (1806), 2 Bos. & P. (N. R.) 269, 314, 315, H. L.; *Anderson* v. *Morice* (1875), L. R. 10 C. P. 609, 624, Ex. Ch.; *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. 36, 43, C. A.; *Buchanan & Co.* v. *Faber* (1899), 4 Com. Cas. 223 (commission may be covered by a policy on disbursements). As to insurable interest in profits, see p. 369, *post*.

(*s*) *Glover* v. *Black* (1763), 3 Burr. 1394.

(*t*) *Gregory* v. *Christie* (1784), 3 Doug. (K. B.) 419; Marshall on Marine Insurance, 4th ed., p. 256.

(*u*) *Currie & Co.* v. *Bombay Native Insurance Co.* (1869), L. R. 3 P. C. 72. See further, as to what is covered by a policy on disbursements, *Roddick* v. *Indemnity Mutual Marine Insurance Co.*, [1895] 2 Q. B. 380, C. A.; *Buchanan & Co.* v. *Faber* (1899), 4 Com. Cas. 223; *Lawther* v. *Black* (1901), 6 Com. Cas. 5, 196, C. A.; *Price* v. *Maritime Insurance Co.*, [1901] 2 K. B. 412, C. A. (on "advances"); *Moran, Galloway & Co.* v. *Uzielli*, [1905] 2 K. B. 555.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 26 (2), (4); and see p. 363, *ante*.

(*b*) *Mackenzie* v. *Whitworth*, *supra*, at p. 42. See also *Carruthers* v. *Sheddon* (1815), 6 Taunt. 14. As to reinsurance, see, further, p. 375, *post*.

(*c*) *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478. Compare *Joyce* v. *Kennard* (1871), L. R. 7 Q. B. 78; *Cunard Steamship Co.* v. *Marten*, [1903] 2 K. B. 511, C. A.

(*d*) In a celebrated judgment LAWRENCE, J., has explained in the following

every person has an insurable interest who is interested in a marine adventure (*e*) and its proceeds. In particular a person is interested in a marine adventure when he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof (*f*).

A person may be said to be interested in an event when, if the event happens, he will gain an advantage, and if it is frustrated he will suffer a loss (*g*), and it may be stated as a general principle that to constitute an insurable interest it must be an interest such that the peril would by its proximate effect cause damage to the assured, that is to say, cause him to lose a benefit or incur a liability (*h*).

Assured must be interested at the time of the loss.

"Lost or not lost."

726. The assured, in order to recover under a policy, must be interested in the subject-matter insured at the time of the loss, but he need not be interested in it when the insurance is effected, provided that where the subject-matter is insured "lost or not lost," the insured may recover although he may not have acquired his interest until after the loss (*i*). It is not, therefore, a good plea to an action brought to recover an average loss of goods on a policy "lost or not lost" that the plaintiff first acquired an interest in the property after the loss occurred, for where the assured purchased or acquired the goods as sound or undamaged goods, a loss has been sustained by him, and as the policy contains the clause "lost or not lost" it covers such past loss (*j*). The same considerations would evidently apply to an action brought to recover a total loss of goods on a policy "lost or not lost" if the contract under which the assured purchased the goods makes him

words the nature of an insurable interest:—"A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; . . . and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance; which relation or concern, by the happening of the perils insured against, may be so effected as to produce a damage, detriment or prejudice to the person insuring. And where a man is so circumstanced with respect to matters exposed to certain risks and dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction" (*Lucena* v. *Craufurd* (1806), 2 Bos. & P. (N. R.) 269, 302, H. L.). See also *per* LAWRENCE, J., in *Barclay* v. *Cousins* (1802), 2 East, 544.

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 5 (1). For the definition of "marine adventure," see note (*m*), p. 337, *ante*.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 5 (2). The assured has an insurable interest in the charges of any insurance which he may effect (*ibid.* s. 13)

(*g*) *Wilson* v. *Jones* (1867), L. R. 2 Exch. 139, Ex. Ch., *per* BLACKBURN, J., at pp. 150, 151.

(*h*) *Seagrave* v. *Union Marine Insurance Co.* (1866), L. R. 1 C. P. 305, *per* WILLES, J., at p. 320.

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 6; *Rhind* v. *Wilkinson* (1810), 2 Taunt. 237; *Cousins* v. *Nantes* (1811), 3 Taunt. 513, Ex. Ch.

(*j*) *Sutherland* v. *Pratt* (1843), 11 M. & W. 296, 311, 312.

SECT. 7. Insurable Interest.

liable for the price, although the goods were totally lost at the time he made the contract. But of course the assured cannot in any case recover for a loss of which he was aware and the insurer was not, at the time when the contract was effected (*k*); moreover, if he has no insurable interest at the time of the loss, he cannot acquire such an interest by any act or election after he is aware of it (*l*).

No insurable interest by election subsequent to the loss.

SUB-SECT. 2.—*Nature of Interest.*

Vested interest in possession not necessary for insurable interest.

727. A vested interest in possession is not necessary to constitute an insurable interest. An expectancy coupled with the present existing title to that out of which the expectancy arises is an insurable interest. Thus freight payable either on the arrival of the goods or under a charterparty is insurable by the shipowner (*m*); but the expectation of benefit to arise from some subject in which the party insuring is not actually interested, but only expects to be interested, is not an insurable interest. Thus the expectation of commission, or of profit to arise out of the sale of goods not contracted for at the time of their loss, is not an insurable interest under a policy (*n*).

Partial interest.

728. A partial interest of any nature is insurable (*o*). Thus an undivided or "hotchpot" interest in the subject-matter insured, such as the interest of a part owner, whether joint tenant or tenant in common, is insurable (*p*). Similarly a portion only of the freight at risk on a particular voyage may be insured (*q*).

Defeasible interest.

729. A defeasible interest is insurable (*r*). For instance, the right of captors to their prize under the Naval Prize Act, 1864 (*s*), is an insurable interest before condemnation, though defeasible by the release of the Crown or by a sentence of restoration (*t*).

Again, where a person who has contracted for the purchase of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods or treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise (*u*).

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 6 (1), Sched. I., r. 1.

(*l*) *Ibid.*, s. 6 (2); *Anderson* v. *Morice* (1876), 1 App. Cas. 713, 749; *Stockdale* v. *Dunlop* (1840), 6 M. & W. 224.

(*m*) See pp. 369, 370, 393, *post*.

(*n*) *Stockdale* v. *Dunlop*, *supra*; compare *Lucena* v. *Craufurd* (1806), 2 Bos. & P. (N. R.) 269, 323, H. L., and see the judgment of WALTON, J., in *Moran, Galloway & Co.* v. *Uzielli*, [1905] 2 K. B. 555 (where the plaintiffs had lent a sum of money to the owners of a foreign ship for disbursements; by instituting an action *in rem* they could, but for the loss of the ship, have acquired a lien on her; and therefore it was held that they had an insurable interest in the ship to the extent of the unsatisfied balance of their advances).

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 8.

(*p*) *Robertson* v. *Hamilton* (1811), 14 East, 522; *Inglis* v. *Stock* (1885), 10 App. Cas. 263, 274.

(*q*) *Griffiths* v. *Bramley-Moore* (1878), 4 Q. B. D. 70, C. A.

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 7 (1).

(*s*) 27 & 28 Vict. c. 25.

(*t*) *Stirling* v. *Vaughan* (1809), 11 East, 619, distinguishing *Lucena* v. *Craufurd*, *supra*, at p. 323; and see cases cited in note (*m*), p. 373, *post*, and title PRIZE LAW AND JURISDICTION.

(*u*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 7 (2); *Sparkes* v. *Marshall* (1836), 2 Bing. (N. C.) 761; *Anderson* v. *Morice*, *supra*, at pp. 727, 735; approved, *Inglis* v. *Stock*, *supra*, at p. 274; explained in *Colonial Insurance*

Contingent interest.

730. A contingent interest is insurable (*a*). For instance, a carrier or other bailee who may become liable to the bailor for the loss of goods by the perils insured against has an insurable interest. Similarly any liability to a third party which may be incurred by the owner of property by reason of maritime perils constitutes an insurable interest (*b*).

A shipowner who has entered into recognisances in the Admiralty Court to pay the salvors of ship and cargo has a lien on, and therefore an insurable interest in, the cargo for the average contribution due to him from its owner (*c*). He may also protect himself by insurance against charges imposed by statute in respect of the carriage of passengers (*d*), and against liabilities consequent on the casualties enumerated in Part VIII. of the Merchant Shipping Act, 1894 (*e*), and of other liabilities resulting from casualties happening in the course of the navigation of his ship.

Profits.

731. In order to have an insurable interest in profits, the assured must either be the owner of goods or must have entered into a legally binding contract for the purchase of them (*f*). Moreover, under a valued policy on profits, he must prove that but for the loss he would have derived some profit (*g*), and in the case of an open policy, he cannot recover more than the amount of profit he would have made if the loss had not occurred (*h*).

SUB-SECT. 3.—*Interests in Ship, Freight and Advance Freight.*

The shipowner.

732. A shipowner has an insurable interest in his ship, even when he has let her out to a charterer who has covenanted to pay him her full value in case of her being lost, and he can in case of such loss recover the full value from the underwriter, the latter being subrogated to the rights of the assured against the charterer (*i*).

A shipowner also has an insurable interest in freight (*k*). It is

Co. of New Zealand v. *Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128, 136, P. C.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 7 (1). See also title CARRIERS, Vol. IV., p. 92.

(*b*) *Ibid.*, ss. 3 (2) (c), 5 (2); *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478; *Joyce* v. *Kennard* (1871), L. R. 7 Q. B. 78; *Stephens* v. *Australasian Insurance Co.* (1872), L. R. 8 C. P. 18; *Hill* v. *Scott*, [1895] 2 Q. B. 713, C. A. See also *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. 36, C. A. (reinsurance by underwriter); *Lucena* v. *Craufurd* (1806), 2 Bos. & P. (N. R.) 269, *per* Lord ELDON, at p. 323; *Moran, Galloway & Co.* v. *Uzielli*, [1905] 2 K. B. 555 (as to which see note (*n*), p. 368, *ante*).

(*c*) *Briggs* v. *Merchant Traders' Ship Loan and Insurance Association* (1849), 13 Q. B. 167.

(*d*) See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 328—335; *Gibson* v. *Bradford* (1855), 4 E. & B. 586; *Willis* v. *Cooke* (1855), 5 E. & B. 641.

(*e*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 506. See also title SHIPPING AND NAVIGATION.

(*f*) *Stockdale* v. *Dunlop* (1840), 6 M. & W. 224; *Sparkes* v. *Marshall* (1836), 2 Bing. (N. C.) 761. As to what profits will be covered under the ordinary form "beginning of the adventure etc.," see note (*q*), p. 365, *ante*.

(*g*) *Hodgson* v. *Glover* (1805), 6 East, 316.

(*h*) *Eyre* v. *Glover* (1812), 16 East, 218.

(*i*) *Hobbs* v. *Hannam* (1811), 3 Camp. 93; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 14 (3). As to subrogation, see pp. 490 *et seq.*, *post*.

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 90, Sched. I., r. 16; see

SECT. 7. Insurable Interest.

important, however, to observe that, as in the case of other interests, the shipowner's right to recover the insured freight depends upon the question whether he had an insurable interest at the time of the loss (*l*), or in other words whether the risk had at that time attached. This question is discussed elsewhere (*m*).

Freight-charterer.

The charterer, as well as the shipowner, may have an insurable interest in freight, because a loss of the goods causes a loss of the bill of lading freight, but whether as a general rule his insurable interest is not limited to the excess of the bill of lading freight over the charterparty freight, is a question which has not yet been decided. It may to some extent depend upon the terms of the charterparty (*n*). Such excess of the bill of lading freight may be insured as "profit on charter" (*o*).

Advance freights.

733. In the case of advance freight, the person advancing the freight has an insurable interest in so far, but only in so far, as such freight is not repayable in case of loss (*p*); whether the money advanced is or is not repayable in case of loss depends upon the terms of the charterparty or other agreement under which the money is advanced (*q*).

So a passenger who has paid his passage money has an insurable interest in it; but it must be designated in the policy as passage money (*r*).

SUB-SECT. 4.—*Vendor and Purchaser.*

Vendor and purchaser.

734. As long as the vendor of a ship or of goods retains any interest in the property, he can insure it to the extent of such interest. Thus where the owner of a ship has sold her under a contract which binds him to pay the purchaser £500 if a loss should happen within three months, he has an insurable interest

p. 365, *ante;* see also judgments of BRETT, J., and BRAMWELL, B., in *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83, at pp. 98, 133. For the meaning of "freight" when used to describe the subject-matter of the policy, see p. 365, *ante.*

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 6.

(*m*) As to commencement and duration of the risk, see pp. 381 *et seq.*, *post.*

(*n*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 16 (2). In *United States Shipping Co.* v. *Empress Assurance Corporation*, [1907] 1 K. B. 259 (a case of sub-charter), the decision of CHANNELL, J., was against the limitation. His judgment was affirmed, but without deciding any question of law, S. C., [1908] 1 K. B. 115, C. A.

(*o*) *Asfar & Co.* v. *Blundell*, [1895] 2 Q. B. 196.

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 12.

(*q*) See, further, title SHIPPING AND NAVIGATION on this question. The following are the principal cases bearing upon it:—*De Silvale* v. *Kendall* (1815), 4 M. & S. 37; *Manfield* v. *Maitland* (1821), 4 B. & Ald. 582, 585; *Wilson* v. *Martin* (1856), 11 Exch. 684; *Winter* v. *Haldimand* (1831), 2 B. & Ad. 649; *Hicks* v. *Shield* (1857), 7 E. & B. 633; *Droege* v. *Suart, The "Karnak"* (1869), L. R. 2 P. C. 505, 514; *Allison* v. *Bristol Marine Insurance Co.* (1876), 1 App. Cas. 209, 222, 229, 234; *Watson & Co.* v. *Shankland* (1873), L. R. 2 Sc. & Div. 304.

(*r*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 90, Sched. I., r. 16; *Denoon* v. *Home and Colonial Assurance Co.* (1872), L. R. 7 C. P. 341; and see p. 365, *ante.* As to the shipowner's right to insure against his obligations to passengers, in case of loss, under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 328—335, see p. 369, *ante.*

to the extent of that sum (*s*). But when the property which is the subject-matter of the contract of sale has completely passed from the vendor to the purchaser, or when it has under the contract of sale become completely at the purchaser's risk, the vendor ceases to have any insurable interest (*t*), and, conversely, the purchaser acquires one. Thus a contract for the sale of goods to be supplied on board a particular vessel may be so framed that the property in them and the risk of their loss do not pass to the purchaser until a complete cargo has been loaded (*a*); or the contract may be so framed that the property in and the risk as to any part of the goods pass to the purchaser on shipment. In the former case the purchaser has no insurable interest until the complete cargo has been loaded; in the latter case he acquires an insurable interest on any part of the goods then shipped.

Right of stoppage *in transitu*.

An unpaid vendor of goods has a right of stoppage *in transitu* if the purchaser has become insolvent, and the goods are stopped before they get into the purchaser's possession, and before he has transferred them to a sub-purchaser by indorsement of the bill of lading; but it follows from the above principles that he has no insurable interest unless and until he has effectually stopped the goods in transit (*b*).

SUB-SECT. 5.—*Mortgagor and Mortgagee.*

Mortgagor and mortgagee.

735. Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.

A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit (*c*).

The mortgagor has an insurable interest in the full value of the property insured, even though it be mortgaged to its full value, because in case of loss he would not only be deprived of the property, but would also remain liable for the mortgage debt (*d*).

(*s*) *Reed* v. *Cole* (1764), 3 Burr. 1512; compare *North of England Oil-cake Co.* v. *Archangel Insurance Co.* (1875), L. R. 10 Q. B. 249.

(*t*) *Joyce* v. *Swann* (1864), 17 C. B. (N. S.) 84; *Ionides* v. *Harford* (1859), 29 L. J. (EX.) 36 (termination of risk by transfer of property); *Seagrave* v. *Union Marine Insurance Co.* (1866), L. R. 1 C. P. 305; *Sparkes* v. *Marshall* (1836), 2 Bing. (N. C.) 761; *Inglis* v. *Stock* (1885), 10 App. Cas. 263. As to the question whether and when under a contract for the sale of goods the property passes to the purchaser or is at his risk, see *Fragano* v. *Long* (1825), 4 B. & C. 219; *Calcutta and Burmah Steam Navigation Co.* v. *De Mattos* (1863), 32 L. J. (Q. B.) 322, 328; and title SALE OF GOODS.

(*a*) *Anderson* v. *Morice* (1875), L. R. 10 C. P. 609, Ex. Ch.; affirmed (1876), 1 App. Cas. 713 (the House being equally divided); *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128, P. C.

(*b*) *Clay* v. *Harrison* (1829), 10 B. & C. 99; Arnould on Marine Insurance, s. 286. Such an interest cannot be acquired after a loss by any election made with knowledge of it; see p. 368, *ante;* see, further, titles SALE OF GOODS; SHIPPING AND NAVIGATION.

(*c*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 14 (1), (2). As to the interest of persons entitled to indemnity, see p. 374, *post.*

(*d*) *Alston* v. *Campbell* (1779), 4 Bro. Parl. Cas. 476; *Ward* v. *Beck* (1863), 13

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When the mortgagor has covenanted to insure the mortgaged property on account of the mortgagees, he holds the proceeds in trust for them (*e*).

As regards the mortgagee, the amount recoverable by him under a policy effected by him will depend upon the intention he had in effecting it. If he intended the policy to cover the whole interest (*f*), that is, his own interest and that of the mortgagor, he can recover the whole amount insured, under trust as to the surplus, to hold it for the mortgagor; but if he intended it only to cover his own interest as mortgagee, he can recover only to the extent of the mortgage debt (*g*).

SUB-SECT. 6.—*Trustee and Consignee.*

Trustee.

736. A trustee who has the legal interest in the subject-matter insured may insure in respect of such interest to the full value of the subject-matter, and may recover the whole amount, alleging the interest to be in himself, and he will then hold such amount in trust for his *cestui que trust* (*h*).

Consignee.

737. A consignee who at the time of the loss has a lien or charge on the property in respect of advances, and an indorsee of a bill of lading to whom a general balance is due, can effect an insurance on their own account, and can recover, averring their interest to be in themselves to the amount of their lien, charge or balance. They can also protect in the same insurance their own interest and the interest of other parties in the property, averring the interest to be in themselves and in those other parties (*i*). A consignee who at the time of the loss has a mere naked right to take possession can recover on a policy effected by him, but only if he alleges the interest in the consignors and also proves that the latter have authorised, or subsequently adopted, the policy (*k*).

C. B. (N. S.) 668 (an instrument which is in form an absolute transfer may be shown to be a mortgage).

(*e*) *Ladbroke* v. *Lee* (1850), 4 De G. & Sm. 106, 119; *Swan and Cleland's Graving Dock and Slipway Co.* v. *Maritime Insurance Co. and Croshaw*, [1907] 1 K. B. 116, 121; compare *Levy & Co.* v. *Merchants' Marine Insurance Co.* (1885), 52 L. T. 263.

(*f*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 14 (2).

(*g*) *Irving* v. *Richardson* (1831), 2 B. & Ad. 193; *Carruthers* v. *Sheddon* (1815), 6 Taunt. 14, 17; *Williams* v. *North China Insurance Co.* (1876), 1 C. P. D. 757, C. A. Compare, however, *Denoon* v. *Home and Colonial Assurance Co.* (1872), L. R. 7 C. P. 341; some parts of the judgment in the last case are difficult to reconcile with the other cases.

(*h*) *Lucena* v. *Craufurd* (1806), 2 Bos. & P. (N. R.) 269, H. L., *per* Lord ELDON, at pp. 323, 324; *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L. R. 8 C. P. 596, *per* BRETT, J., at p. 638.

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 14 (2). This provision embodies the law as laid down in *Wolff* v. *Horncastle* (1798), 1 Bos. & P. 316; *Hill* v. *Secretan* (1798), 1 Bos. & P. 315; *Robertson* v. *Hamilton* (1811), 14 East, 522; *Carruthers* v. *Sheddon, supra.* See also *Sutherland* v. *Pratt* (1843), 12 M. & W. 16; *Hibbert* v. *Carter* (1787), 1 Term Rep. 745; *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A., *per* BOWEN, L.J., at p. 398.

(*k*) *Lucena* v. *Craufurd, supra, per* Lord ELDON; *Seagrave* v. *Union Marine Insurance Co.* (1866), L. R. 1 C. P. 305, *per* WILLES, J., at pp. 319, 320. Whether an equitable consignee to whom at the time of the loss the legal

A consignee has an insurable interest in his commission if at the time of the loss he has a binding contract for the consignment to him of a cargo (*l*).

Interest in commission.

SUB-SECT. 7.—*Captors.*

Captors, prize agents etc.

738. Captors, prize agents and others very often effect policies on captured property. The captors generally are in possession of the property captured, and are liable to pay costs and charges if they have taken possession improperly, and are also liable to render back property if it should turn out to be neutral. They therefore have an interest in the property (*m*).

SUB-SECT. 8.—*Wages: Bottomry and Respondentia.*

Interest of master or crew.

739. The master or any member of the crew of a ship has an insurable interest in respect of his wages (*n*).

Bottomry and *respondentia.*

The lender of money on bottomry or *respondentia* has an insurable interest in respect of the loan (*o*), because the borrower is discharged from liability if the ship or goods which are hypothecated be totally lost (*p*).

In order that an assured may be entitled to recover under a policy on bottomry or *respondentia*, the bond or instrument of hypothecation must be legally valid, creating a maritime risk; and

property in the goods has not passed, but who was beneficially interested in the whole of them, can recover the full value on an averment of interest in himself alone, or whether he must also aver the interest of the other parties, is a question on which the Court of Common Pleas was equally divided in *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L. R. 8 C. P. 596, but this question can only be material when there are peculiar circumstances, such as existed in that case, which make the plaintiff unwilling to aver the interest in himself and the consignor.

(*l*) See *Ward & Co., Ltd.* v. *Weir & Co.* (1899), 4 Com. Cas. 216, *per* MATHEW, J., at p. 223 (shipowner has insurable interest in commission payable by him in case of loss). Compare *Knox* v. *Wood* (1808), 1 Camp. 543; *Buchanan & Co.* v. *Faber* (1899), 4 Com. Cas. 223, *per* BIGHAM, J., at p. 226.

(*m*) *Boehm* v. *Bell* (1799), 8 Term Rep. 154, 161; *Lucena* v. *Craufurd* (1806), 2 Bos. & P. (N. R.) 269, H. L., *per* Lord ELDON, at pp. 323, 324. Captors and prize agents will, according to the present practice, aver the interest to be in themselves and the Crown or some one or more of them, and that the insurance was effected on behalf of the person so interested, and in so far as the captors have not an insurable interest in the property the Crown can obtain the benefit of the policy. On this subject see *Le Cras* v. *Hughes* (1782), 3 Doug. (K. B.) 81, as explained in *Lucena* v. *Craufurd, supra*; *Craufurd* v. *Hunter* (1798), 8 Term Rep. 13; *Stirling* v. *Vaughan* (1809), 11 East, 619; *Routh* v. *Thompson* (1811), 13 East, 274, 284, 285; *Devaux* v. *Steele* (1840), 6 Bing. (N. C.) 358, 370. The Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 55, enacts that nothing therein shall give the captors any right in prize ships or goods, and that they shall continue to take only such interest (if any) as may be granted them by the Crown. See title PRIZE LAW AND JURISDICTION.

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 11. Previously to the Act it was held on grounds of public policy that an insurance of his wages by a member of the crew, as distinguished from the master, was invalid. For the history of the subject, see Arnould on Marine Insurance, s. 241; and see title SHIPPING AND NAVIGATION.

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 11.

(*p*) As to the necessity of specifically describing such interests in the policy see p. 366, *ante*. As to the nature and incidents of bottomry or *respondentia*, see title SHIPPING AND NAVIGATION.

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therefore nothing can be recovered under the policy if the money be made repayable in any event, and whether the property hypothecated be or be not lost on the insured voyage (*q*).

The borrower on bottomry or *respondentia*, like a mortgagor, continues to have an insurable interest in the hypothecated ship or goods, inasmuch as the debt is discharged only if the property be totally lost (*r*).

SUB-SECT. 9.—*Shareholders in Companies.*

Shareholders in companies.

740. There may be an insurable interest in an adventure without an insurable interest in any of the property at risk. Thus a shareholder in a company is not a part owner of the property of the company, inasmuch as such property belongs to the company, which is a legal entity independent of its shareholders (*s*); yet a shareholder in a company established for the laying down of an electric cable has an insurable interest in the adventure which he can protect by a properly-worded policy (*t*).

SUB-SECT. 10.—*Interest of Person entitled to be Indemnified by Another.*

Right to be indemnified does not destroy interest.

741. The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or is liable, to indemnify him in case of loss (*a*). Thus, where the owner of a vessel lets her out under a contract of affreightment to a charterer who covenants, in case of loss, to pay him her full value, he has a right to insure to the full amount; for he is not bound to trust exclusively to the credit of the charterer (*b*). So also the owner of goods may insure them for their full value, and in case of loss recover that amount from the underwriter, although the carrier may also be liable to indemnify him against their loss (*c*). In such cases the underwriter will be subrogated to the rights of the assured against the party liable to indemnify him (*d*).

(*q*) *Simonds* v. *Hodgson* (1832), 3 B. & Ad. 50; *Stainbank* v. *Fenning* (1851), 11 C. B. 51; *Stainbank* v. *Shepard* (1853), 13 C. B. 418.

(*r*) It seems, however, on principle, open to much doubt whether the assured in case of a total loss of the property hypothecated can recover anything more than the excess of the insurable value of the property over the amount of the debt.

(*s*) *R.* v. *Arnaud* (1846), 9 Q. B. 806; *Salomon* v. *Salomon & Co.*, *Salomon & Co.* v. *Salomon*, [1897] A. C. 22. See title COMPANIES, Vol. V., p. 12.

(*t*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 5 (2); *Wilson* v. *Jones* (1867), L. R. 2 Exch. 139, Ex. Ch.; compare *Paterson* v. *Harris* (1862), 2 B. & S. 814 (where a shareholder in a telegraph company was held, by reason of the peculiar wording of the policy, to have insured the electric cable itself; it is to be observed, however, that in that case the interest of the assured was not traversed).

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 14 (3). As to indemnity generally, see title GUARANTEE, Vol. XV., pp. 444 *et seq.*

(*b*) *Hobbs* v. *Hannam* (1811), 3 Camp. 93.

(*c*) The carrier has also an insurable interest; see Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 3 (1) (c); and p. 369, *ante*, and cases there cited.

(*d*) As to subrogation, see, generally, titles EQUITY, Vol. XIII., p. 149; GUARANTEE, Vol. XV., p. 509; and p. 490, *post*.

Reinsurance.

742. The insurer, inasmuch as he is liable on a policy of insurance, may insure against the risk which he has taken upon himself. This second contract of insurance is called a contract of reinsurance. Contracts of reinsurance were made legal in 1864 (*e*), and now under the Marine Insurance Act, 1906 (*f*) the insurer under a contract of marine insurance has an insurable interest in his risk, and may reinsure in respect of it (*f*).

Subject-matter.

The subject-matter of the reinsurance on ship, freight, goods, or whatever it may be, is the same as that of the original insurance, though the interest of the reassured is different from that of the original assured, and arises from the fact that the reassured is the underwriter under the original policy (*g*).

Reinsurance clause.

As it is generally unnecessary to state in the policy the nature of the assured's interest, the fact that the contract is one of reinsurance need not necessarily appear on the face of the policy (*h*). In English policies it is, however, almost the universal practice to insert a clause, often called the "reinsurance clause," to the following effect: "Being a reinsurance, subject to the same clauses and conditions as the original policy, and to pay the same as may be paid thereon" (*i*).

Original assured has no interest.

743. Unless the policy of reinsurance otherwise provides, the original assured has no right or interest in respect of such reinsurance (*k*); the original contract of insurance and the contract of reinsurance are two distinct contracts, and the reassured remains solely liable on the original insurance, and alone has any claim against the reinsurer. It, therefore, follows that the reinsurer is bound to pay the whole amount of the loss to the trustee of an insolvent insurer and not merely the dividend which the original assured receives from the estate. This is true even when the reinsurance policy contains the reinsurance clause; for this clause does not prevent the reassured from recovering from his underwriter as soon as the loss happens and before the former has paid his assured (*l*).

Proof of loss.

744. Subject to any provision to the contrary in the reinsurance policy, the reassured, in order to recover from his underwriter, must

(*e*) Inland Revenue (Stamp Duties) Act, 1864 (27 & 28 Vict. c. 56), s. 1.

(*f*) 6 Edw. 7, c. 41, s. 9 (1).

(*g*) *Nelson* v. *Empress Assurance Corporation*, [1905] 2 K. B. 281, C. A., *per* MATHEW, L.J., at p. 285 (reinsurance not a contract of indemnity to which R. S. C., Ord. 16, r. 48, as to third party procedure, applies).

(*h*) *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. 36, C. A.

(*i*) As to non-incorporation of clauses which are inapplicable, see *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Insurance Co.*, [1906] A. C. 59, P. C. (fire). As to the construction of particular clauses, see *Insurance Co. of North America* v. *North China Insurance Co.* (1898), 4 Com. Cas. 67, C. A.; *Re Law Car and General Insurance Corporation, Ltd.*, [1911] W. N. 91; affirmed, [1911] W. N. 101, C. A. (reinsurance by one company with another of all its risks).

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 9 (2).

(*l*) *Re Eddystone Marine Insurance Co., Ex parte Western Insurance Co.*, [1892] 2 Ch. 423.

SECT. 7. Insurable Interest.

prove the loss in the same manner as the original assured must have proved it against him, and the reinsurer can raise all defences which were open to the reassured against the original assured (*m*). This is evident in the case of the reassured seeking to recover from his underwriter before he has paid under the original insurance, and it seems that the same is true of the reassured who has previously paid his assured, inasmuch as it would be inequitable for him to renounce any of his defences so as to prejudice the reinsurer. How far this last proposition is true in case of the policy containing the reinsurance clause is doubtful. This much, however, is, it is submitted, clear; the reinsurer will be, under the reinsurance clause, obliged to pay what the reassured has paid to his assured, unless it be proved that he was not legally bound to make such payment. On the other hand, it seems probable that the reassured cannot recover from his reinsurer any sum paid by him which a prudent underwriter would not have paid, unless he has done so with the consent of the reinsurer (*n*).

Suing and labouring clause.

745. The effect of the suing and labouring clause in the original policy or in the reinsurance policy upon the liability of the reinsurer is dealt with elsewhere (*o*).

Incorporation of usual clauses.

Clauses which are contained in the original insurance, if they are usual clauses, such as the so-called "continuation clause" or the "warehouse to warehouse clause," are considered to be incorporated in a reinsurance policy, in the usual form, if they are not inconsistent with its express terms (*p*).

Notice of abandonment.

The reinsured need not give notice of abandonment in case of a total loss (*q*).

(*m*) The reinsurers are entitled to an affidavit of ship's papers, though they are not in the custody of the plaintiffs (*China Traders' Insurance Co.* v. *Royal Exchange Assurance Corporation*, [1898] 2 Q. B. 187, C. A.).

(*n*) *Chippendale* v. *Holt* (1895), 1 Com. Cas. 197; *Marten* v. *Steamship Owners' Underwriting Association* (1902), 7 Com. Cas. 195; *Western Assurance Co. of Toronto* v. *Poole*, [1903] 1 K. B. 376, 386; and see 1 Parsons, Marine Insurance, 1st ed., p. 299, n.

(*o*) See p. 343, *ante*, and p. 456, *post*; *Uzielli* v. *Boston Marine Insurance Co.* (1884), 15 Q. B. D. 11, C. A. As to the meaning of a clause in the policy of reinsurance that no claim shall attach for salvage charges, see *Western Assurance Co. of Toronto* v. *Poole*, [1903] 1 K. B. 376 (where it was held that the clause excluded the defendant's obligation to contribute to the suing and labouring charges, notwithstanding the omission to delete the printed clause imposing that obligation).

(*p*) *Joyce* v. *Realm Insurance Co.* (1872), L. R. 7 Q. B. 580 (outward cargo considered homeward interest); *Franco-Hungarian Insurance Co.* v. *Merchants' Marine Insurance Co.* (1888), Shipping Gazette Weekly Summary, 15th June; *Charlesworth* v. *Faber* (1900), 5 Com. Cas. 408; *Martin* v. *Nippon Sea and Land Insurance Co.* (1898), 3 Com. Cas. 164 (conveyance and transhipment risks); *Lower Rhine and Wiirtemburg Insurance Association* v. *Sedgwick*, [1898] 1 Q. B. 739; reversed, [1899] 1 Q. B. 179, C. A. (where the question whether a reinsurance can cover risks on a policy not in existence at the date of reinsurance, answered in the affirmative by KENNEDY, J., was left undecided by the Court of Appeal). For a clause inapplicable to reinsurance and therefore rejected, see *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Insurance Co.*, [1907] A. C. 59, P. C. (fire policy).

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (9); *Uzielli* v. *Boston Marine Insurance Co.*, *supra*. As to notice of abandonment, see, further, p. 486, *post*.

SUB-SECT. 12.—*Wagering Policies.*

SECT. 7. Insurable Interest.

Gaming and wagering policies.

746. At common law insurances by way of gaming or wagering were valid, but a policy which did not contain a clause expressly dispensing with proof of interest, or which did not otherwise show that the contract was not intended to be one of indemnity, was deemed to be a contract of indemnity on which the assured could not recover without proof of interest (*r*). A policy expressly made "interest or no interest" or "without further proof of interest than the policy itself" or "without benefit of salvage to the insurer," is commonly called a "p. p. i. policy" (that is, policy proof of interest) or "an honour or wager policy" (*a*).

"P. p. i. policy."

Gaming Act, 1845.

In 1845 it was enacted that all contracts or agreements by way of gaming or wagering shall be null and void (*b*). This applies to all insurances which are really wagers, whether or not they be in the form of p. p. i. policies. But a p. p. i. policy is not necessarily inconsistent with the assured having an insurable interest; indeed, it often happens that such a policy is effected by persons who have an insurable interest but who wish to avoid the difficulty of proving it. In such case the policy would not be a wagering contract within this provision (*c*).

Marine Insurance Act, 1906.

The Marine Insurance Act, 1906 (*d*), provides that:—

(1) Every contract of marine insurance by way of gaming or wagering is void (*e*).

(2) A contract of marine insurance is deemed to be a gaming or wagering contract (i.) where the assured has not an insurable interest, as defined by the Act, and the contract is entered into with no expectation of acquiring such an interest; or (ii.) where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage" to the insurer, or subject to any other like term: provided that where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer (*f*).

Marine Insurance (Gambling Policies) Act.

747. A still more modern statute (*g*) declares every contract of marine insurance effected by any person not having a *bonâ fide*

(*r*) *Lucena* v. *Craufurd* (1806), 2 Bos. & P. (N. R.) 269, H. L., *per* Lord ELDON, at p. 321; *Cousins* v. *Nantes* (1811), 3 Taunt. 513, Ex. Ch.

(*a*) By the Marine Insurance Act, 1745 (19 Geo. 2, c. 37) (which, however, did not extend to Ireland (*Keith* v. *Protection Marine Insurance Co.* (1882), 10 L. R. Ir. 51), nor to foreign ships (*Thellusson* v. *Fletcher* (1780), 1 Doug. (K. B.) 315)) such p. p. i. policies, as well as all other policies by way of gaming and wagering, if they were insurances on British ships, or cargoes, or interests relating to the same, were, with certain unimportant exceptions, prohibited. See on this enactment (now repealed, note (*d*), *infra*) *Allkins* v. *Jupe* (1877), 2 C. P. D. 375; *Berridge* v. *Man On Insurance Co.* (1887), 18 Q. B. D. 346, C. A., following *Smith* v. *Reynolds* (1856), 1 H. & N. 221, and *De Mattos* v. *North* (1868), L. R. 3 Exch. 185.

(*b*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18. As to wagering contracts, in general, see title GAMING AND WAGERING, Vol. XV., pp. 265 *et seq.*

(*c*) *Wilson* v. *Jones* (1867), L. R. 2 Exch. 139, 146, Ex. Ch.

(*d*) 6 Edw. 7, c. 41, repealing (see s. 92, Sched. II., *ibid.*) the Marine Insurance Act, 1745 (19 Geo. 2, c. 37) (see note (*a*), *supra*), but leaving untouched the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18 (see note (*b*), *supra*).

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 4 (1).

(*f*) *Ibid.*, s. 4 (2).

(*g*) Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. 7, c. 12), s. 1.

SECT. 7. Insurable Interest.

interest or expectation of interest, and every such contract effected by any person, not being a part owner, in the employment of the owner (*h*) of a ship, in relation to that ship, in the terms above specified (*i*), to be a "contract by way of gambling on loss by maritime perils"; and the person who effects it, and the broker through whom and the insurer with whom it is effected (if these persons act knowingly) are guilty of a criminal offence punishable on summary conviction (*j*).

SECT. 8.—*Valued Policies.*

SUB-SECT. 1.—*Definition: Conclusiveness of Valuation.*

Valued or unvalued. Definitions.

748. A policy may be either valued or unvalued.

A valued policy is one which specifies the agreed value of the subject-matter insured (*k*); an unvalued, or, as it is frequently called, an open, policy is one which does not specify the value of the subject-matter but leaves it to be subsequently ascertained (*l*).

Usual clause.

The policy usually contains the following clause:—"The said ship, etc., goods and merchandise, etc., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at——." The difference in form between a valued and an unvalued policy is that in a valued policy the blank is filled up with the sum at which the parties agree to value the subject-matter insured, whereas in an unvalued policy it is left in blank. The difference in legal effect between the two policies is that in the case of an unvalued policy the value of the subject-matter insured is not admitted but has to be subsequently ascertained, whereas in the case of a valued policy, unless it be voidable on the ground of fraud or for some other reason, the value fixed by the policy is as between the insurer and assured conclusive of the value of the subject intended to be insured (*m*). Thus, if a ship that has been worth £8,000 be so much injured that she is not worth repairing, but, this fact being unknown to the assured, he effects an insurance upon her, whilst in that condition, by a policy for £6,000, valued at £8,000, and after the policy has attached the

(*h*) "Owner" includes charterer (Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. 7, c. 12), s. 1 (8)).

(*i*) See p. 377, *ante;* Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 4 (2) (b).

(*j*) Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. 7, c. 12), s. 1 (1), (2). The penalty is imprisonment, with or without hard labour, for not exceeding six months, or a fine not exceeding £100, and, in either case, forfeiture to the Crown of the proceeds of the contract (*ibid.*, s. 1 (1)). Proceedings may not be instituted without the consent of the Attorney-General (in Scotland the Lord Advocate) (*ibid.*, s. 1 (3)); nor, in the case of a person not in the shipowner's employment, until he has had an opportunity of showing that the contract was not a gambling contract, and information given by him for this purpose is not in proceedings under the Act to be evidence against him (*ibid.*, s. 1 (4)); but as against such a person a contract in the terms above specified ("interest or no interest" etc.) is deemed to be a gambling contract unless the contrary is proved (*ibid.*, s. 1 (5)). There is in England an appeal to quarter sessions (*ibid.*, s. 1 (7)). As to procedure on such appeals, see title MAGISTRATES.

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 27 (1), (2).

(*l*) *Ibid.*, s. 28.

(*m*) *Ibid.*, s. 27 (3).

vessel is wholly destroyed by a storm, the valuation is binding, and the assured is entitled to recover £6,000 (*n*).

SECT. 8. Valued Policies.

SUB-SECT. 2.—*Over-valuation as Ground for avoiding the Policy.*

Over-valuation may avoid contract.

749. As long as the contract of insurance is unimpeached the valuation is binding on the parties, but over-valuation may be a ground for avoiding the contract. Thus, if the over-valuation be part of a scheme for defrauding the underwriters, the policy will be voidable (*o*). Similarly an over-valuation made in order to cover a gambling transaction will avoid the whole contract; for instance, where an insurance is made in the sum of £2,000, and it is proved that the interest of the assured amounted to a cable only (*p*). Thirdly, an over-valuation, although not fraudulent, may be so great as to constitute a material fact, the concealment of which will entitle the underwriter to avoid the policy (*q*).

SUB-SECT. 3.—*Opening Valuation where Whole Subject-matter is not at Risk.*

Valuation binds only as far as it goes.

750. The parties, however, are only bound by the valuation as far as it goes, and it is therefore always competent to the underwriter to show that part only of the subject intended to be valued in the policy was actually at risk (*r*). For instance, if the insurance be on a cargo valued at £3,000, and the goods at risk amounted only to half a cargo, the underwriter in case of total loss is liable only for £1,500. Similarly, if freight be valued at £6,000 and be intended to be freight for a full cargo, and only one-half of such a full cargo is loaded, the underwriter in case of total loss is liable only for £3,000. In this sense, and to this extent only, can the valuation be opened in the foregoing and similar cases (*s*).

(*n*) *Barker* v. *Janson* (1868), L. R. 3 C. P. 303; *Woodside* v. *Globe Marine Insurance Co.*, [1896] 1 Q. B. 105. Except for the purpose of determining whether there has been a constructive total loss (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 27 (4), see p. 484, *post*), the valuation is binding generally, and not merely in cases where the question is as to the amount payable by underwriters in case of loss, for the valuation constitutes as between the parties a conclusive admission as to the value of the subject-matter to which it refers (*Muirhead* v. *Forth and North Sea Steamboat Mutual Insurance Association*, [1894] A. C. 72, 79). It has been held, for example, to be binding on the parties to the contract with reference to questions of general average, contribution and subrogation (*Steamship Balmoral Co.* v. *Marten*, [1902] A. C. 511; *North of England Insurance Association* v. *Armstrong* (1870), L. R. 5 Q. B. 244). See pp. 471, 493, *post*.

(*o*) *Haigh* v. *De la Cour* (1812), 3 Camp. 319; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 27 (3).

(*p*) *Lewis* v. *Rucker* (1761), 2 Burr. 1167, 1171.

(*q*) *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531. See also the memorandum of WILLES, J., cited by MATHEW, J., in *Herring* v. *Janson* (1895), 1 Com. Cas. 177, 178. As to avoidance of the policy, see pp. 404 *et seq.*, *post*.

(*r*) The Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 75 (2), enacts that: "Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy."

(*s*) For cases in which the valuation was opened because the whole of the subject intended to be valued was not at risk, see *Forbes* v. *Aspinall* (1811), 13

SECT. 8. Valued Policies.

The question as to what was intended to be valued in the valuation clause depends upon the intention of the parties, and such intention is to be ascertained from the words of the clause, having regard to the circumstances under which the contract of insurance was made (*t*).

SECT. 9.—*Double Insurance.*

SUB-SECT. 1.—*Definition: Effect as between Assured and Insurer.*

Double insurance.

751. Where two or more policies are effected by or on behalf of the assured on the same adventure and interest, or on any part thereof, and the sums insured exceed the indemnity allowed by the Act, the assured is said to be over-insured by double insurance (*a*).

Over-insurance.

Where the assured is over-insured by double insurance, the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by the Act (*b*). Thus, if a merchant, the value of whose whole interest is £3,000, first effects a policy on this interest at Liverpool for £2,000, and then another policy on the same interest at London for £3,000, he can recover the whole amount of £3,000 on the London policy.

Valued policy.

Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured; and where the policy is an unvalued policy, he must give credit as against the full insurable value for any sum received by him under any other policy (*c*). The result is that the amount recoverable may sometimes depend on the order in which actions on different policies are instituted. Thus, if a ship be insured by policy A for £2,000 valued at £4,000, and by policy B for £2,000 valued at £3,000, and there be a total loss, the assured can recover £2,000 on policy B, and then claim £2,000 on policy A. But if he first receives from the underwriters

East, 323, 327 (freight); *Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651; *Tobin* v. *Harford* (1864), 17 C. B. (N. S.) 528, Ex. Ch. (goods); and see note (*t*), *infra*.

(*t*) *Williams* v. *North China Insurance Co.* (1876), 1 C. P. D. 757, C. A.; *Denoon* v. *Home and Colonial Assurance Co.* (1872), L. R. 7 C. P. 341; *The Main*, [1894] P. 320. In club insurances on freight, it is a common rule that "in the event of the total loss of a ship, the amount insured shall be deemed the owner's interest at risk, and he shall be paid such amount whether the vessel be loaded, in ballast or under charter." Such a clause amounts to a binding valuation of the freight covering whatsoever may be the nature of the freight lost by reason of the total loss of the ship. As to mutual insurance clubs, see p. 504, *post*.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 32 (1).

(*b*) *Ibid.*, s. 32 (2) (a). This provision embodies the law as laid down in *Newby* v. *Reed* (1763), 1 Wm. Bl. 416; *Rogers* v. *Davis* (1776), 2 Park on Insurance, 8th ed., p. 601. The Continental law on this subject differs from the English law. It generally makes the successive policies protect the property in order of date, and American policies usually contain a clause embodying substantially the Continental law. As to the Continental law and the history of the subject, see Arnould on Marine Insurance, s. 331.

(*c*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 32 (2) (b), (c). These provisions embody the law as laid down in *Bruce* v. *Jones* (1863), 1 H. & C. 769, which virtually overruled *Bousfield* v. *Barnes* (1815), 4 Camp. 228.

on policy A £2,000, the sum insured by that policy, then he can only claim on policy B the difference between £2,000 and the amount of the valuation (£3,000), *i.e.*, £1,000.

SUB-SECT. 2.—*Rights of Insurers, inter se, and against the Assured.*

Contribution between insurers.

752. Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract (*d*), and if any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and to the like remedies as a surety who has paid more than his proportion of the debt (*e*).

Assured to account for excess over indemnity.

Finally, where the assured receives any sum in excess of the indemnity allowed by the Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves (*f*).

SUB-SECT. 3.—*Effect of Two or more Insurances in Different Interests.*

Insurances on different interests.

753. Double insurance only arises when two or more policies are effected in the same interest. When they are effected to cover different interests, there can be no contribution amongst the underwriters, but the principle of subrogation then applies and limits the amount ultimately paid by all the underwriters to the indemnity allowed by the Act (*g*).

SECT. 10.—*Commencement, Duration, and Area of Risk.*

SUB-SECT. 1.—*Time Policies.*

(i.) *Commencement and Duration of Risk: Continuation Clause.*

Commencement and duration of risk.

754. The two limits of time prescribed in a time policy (*h*) determine, in the absence of any stipulation to the contrary, the beginning and end of the risk, or, in other words, the insured period. A time policy, however, may be effected retrospectively by the insertion of the ordinary clause "lost or not lost" (*i*); for instance, if a policy is effected on the 15th August, 1911, to

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 80 (1). Speaking generally, where several persons are co-sureties for the same debt, and one of them is called upon to pay more than his share, he is entitled to contribution from the others proportionately to the amounts for which each is a surety; see title GUARANTEE, Vol. XV., p. 526; *Dering* v. *Winchelsea* (*Earl*) (1787), 1 Cox, Eq. Cas. 318, and the notes thereto in 2 White & Tud. L. C., 7th ed., 535. How the total sum paid to the assured should be apportioned as between the different underwriters is not settled by the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), nor by any decided cases or established practice. An attempt to solve this problem is to be found in Arnould on Marine Insurance, s. 354.

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 80 (2).

(*f*) *Ibid.*, s. 32 (2) (d).

(*g*) See *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1877), 5 Ch. D. 569, 576, 584, C. A.; *Godin* v. *London Assurance Co.* (1758), 1 Burr. 489, 495; see also Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 32 (2) (d), 79; and p. 494, *post*.

(*h*) For definition of time policy, see p. 336, *ante*.

(*i*) See p. 367, *ante*.

SECT. 10. Commencement, Duration, and Area of Risk.

commence on 1st day on the same month, it will cover any losses occurring after the latter date.

A time policy will cover any loss, whether total or partial, occurring (*j*) during the insured period, although the amount of the loss be only ascertained after the expiration thereof. For instance, if there be an insurance for six months on a ship which has received her death wound some days before, but is kept afloat by pumping until after the expiration of the six months, the underwriters would be liable for a total loss (*k*).

Continuation clause.

755. English time policies usually contain a clause, called the "continuation clause," which continues the insurance after the expiration of the insured period until the ship arrives at her port of destination (*l*). But the Stamp Act, 1891 (*m*), provided that no policy of sea insurance made for time shall be made for any time exceeding twelve months (*m*), and as the continuation clause usually extended the insurance beyond that period it violated the provisions of the Act (*n*). It was consequently provided by the Finance Act, 1901 (*o*), that a policy of sea insurance shall not be invalid on the ground that by reason of a continuation clause it may become available for a period exceeding twelve months; and a continuation clause is defined as an agreement to the effect that in the event of the ship being at sea, or the voyage otherwise not completed, on the expiration of the policy, the subject-matter of the insurance shall be held covered until the arrival of the ship, or for a reasonable time thereafter not exceeding thirty days (*o*). A policy containing such a continuation clause is chargeable with a stamp duty of 6*d.* in addition to the duty otherwise chargeable (*o*).

Stamp Act, 1891.

Finance Act, 1901.

Marine Insurance Act, 1906.

Finally, the Marine Insurance Act, 1906 (*p*), declares that, subject to the above provisions of the Finance Act, 1901 (*o*), a time policy which is made for any time exceeding twelve months is invalid. The result is that a time policy containing a continuation clause is valid if stamped with an additional stamp, but if not so stamped is invalid.

(*j*) It is not enough that a pre-existing injury was discovered during the period (*Hutchins Brothers* v. *Royal Exchange Assurance* (1911), 27 T. L. R. 217; affirmed (1911), 27 T. L. R. 482, C. A.).

(*k*) *Knight* v. *Faith* (1850), 15 Q. B. 649, explaining *Meretony* v. *Dunlope* (1783), referred to by WILLES, J., in his judgment in *Lockyer* v. *Offley* (1786), 1 Term Rep. 252, at p. 260. Compare *Hough & Co.* v. *Head* (1885), 55 L. J. (Q. B.) 43, C. A.

(*l*) The continuation clause is sometimes in the following form: "Should the vessel at the expiration of the policy be at sea, or in distress, or in a port of refuge or of call, she shall, provided previous notice be given to the underwriters, be held covered at a *pro ratâ* monthly premium to her port of destination." It is sometimes in a somewhat different form, providing simply that if the ship be at sea at the expiration of the insured period, the insurance shall continue until the ship arrives at some port (*Charlesworth* v. *Faber* (1900), 5 Com. Cas. 408; *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega*, [1902] 2 K. B. 384, C. A.).

(*m*) 54 & 55 Vict. c. 39, s. 93 (2).

(*n*) See cases cited cited in note (*l*), *supra*.

(*o*) 1 Edw. 7, c. 7, s. 11. By the Revenue Act, 1903 (3 Edw. 7, c. 46), s. 8, a policy on a ship under construction or repair, though made for a time exceeding twelve months, is not deemed to be a time policy.

(*p*) 6 Edw. 7, c. 41, s. 25 (2).

756. Where the insurance is expressed to be from a certain day until another day the risk does not in general commence to run until the former day has expired, and the risk will continue until the expiration of the latter day (*q*). The time according to which the insured period will be measured is, in the absence of a contrary intention, the time of the place where the contract of insurance is executed, and therefore in English policies that time is Greenwich time (*r*). When the insured period begins and ends.

(ii.) *Area of Risks covered by Time Policy.*

757. The policy, in the absence of any stipulation to the contrary, covers the ship on whatever voyage or service she may be engaged during the insured period (*s*). It is, however, now very common for the policy to except certain geographical limits, either entirely or for certain seasons of the year, as, for instance, "warranted no St. Lawrence between 1st October and 1st April" (*t*). Risks covered by time policy.

758. Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed (*a*). But in order to recover on the policy the assured must prove a loss that has occurred within the insured period, there being no presumption that the loss took place at a particular time. No presumption of date of loss of missing ship.

What is a reasonable time is a question of fact; for instance, if the ship has met with some disaster or encountered a violent storm during the insured period, or if the ship has failed to arrive at her destination within the ordinary time, a loss during the insured period may be presumed (*b*).

(iii.) *Mixed Policies.*

759. Time policies are sometimes made in which not only the time is specified for which the risk is insured, but in which the voyage also is described (*c*); for instance, the insurance may be "at and from London to Cadiz for six months," or "from 1st January, 1908, to 1st June, 1908, at and from Bristol to Marseilles, etc." Mixed policies.

(*q*) *Isaacs* v. *Royal Insurance Co.* (1870), L. R. 5 Exch. 296 (fire). See *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402, C. A. (accident); see also *Johnson & Co., Ltd.* v. *Bryant* (1896), 1 Com. Cas. 363.

(*r*) See 1 Phillips, Law of Insurance, s. 949; and the Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9), s. 1. See also title TIME.

(*s*) *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284, supplemented by *Thompson* v. *Hopper* (1856), 6 E. & B. 172; and *Fawcus* v. *Sarsfield* (1856), 6 E. & B. 192.

(*t*) *Birrell* v. *Dryer* (1884), 9 App. Cas. 345; see also *Simpson Steamship Co.* v. *Premier Underwriting Association* (1905), 10 Com. Cas. 198; see also, as to express warranty, p. 418, *post*, and as to mixed polices, the text, *infra*.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 58.

(*b*) *Reid* v. *Standard Marine Insurance Co.* (1886), 2 T. L. R. 807; compare *Re Rhodes, Rhodes* v. *Rhodes* (1887), 36 Ch. D. 586, 591 (presumption of death).

(*c*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 25 (1). As to extension of risk for a period of time beyond the voyage covered by a voyage policy, see p. 384, *post*.

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Such policies are called "mixed policies." Under them the underwriter is not liable for a loss that has not occurred within the insured period, nor is he liable for any loss unless the ship originally sailed on the voyage described in the policy and was at the time of the loss sailing on the prescribed course between the termini of the voyage (*d*).

SUB-SECT. 2.—*Voyage Policies.*

(i.) *Commencement and Duration of Risk on Goods.*

Commencement of risk on goods.

760. The clause in Lloyd's policy (which is also to be generally found in most other policies) relating to the commencement of the risk on goods is as follows: "Beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at ——." The risk consequently does not attach upon the goods until they are actually on board, and the insurer is not liable for a loss occurring while they are in transit from the shore to the ship (*e*).

The insurer's liability may, however, be extended by express words in the policy (*f*); and it is usual to insert in it a clause such as "including risk of craft to and from the vessel." Some policies even contain a still more extensive clause called the "warehouse to warehouse clause," which covers "all and every risk in craft to and/or from the vessel or vessels, and all risks, including fire, from the warehouse of the consignor by any conveyance by land or by water, and until safely delivered into the warehouses of the consignees and/or their agents" (*g*).

"Warehouse to warehouse clause."

Effect of common clause.

The common clause (*h*) imports that the risk is only to attach upon goods loaded on board the ship at the *terminus a quo* of the voyage, even although it was known to the underwriters that the policy was intended to protect goods loaded at some other port (*i*). This very strict construction, which is often not in accordance with the intention of the parties, has, however, been disapproved of, and is not likely to be adopted in

(*d*) *Way* v. *Modigliani* (1787), 2 Term Rep. 30; *Robertson* v. *French* (1803), 4 East, 130; see also *Johnson & Co., Ltd* v. *Bryant* (1896), 1 Com. Cas. 363; *Maritime Insurance Co., Ltd.* v. *Alianza Insurance Co. of Santander*, [1907] 2 K. B. 660; *Difiori* v. *Adams* (1884), 53 L. J. (Q. B.) 437.

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 4. As to the effect of insurance "from" a particular place, see *ibid.*, p. 388, *post*. For form of Lloyd's policy, see note (*p*), p. 340, *ante*.

(*f*) *Hurry* v. *Royal Exchange Assurance Co.* (1801), 2 Bos. & P. 430, 435; and see, further, pp. 385, 387, *post*.

(*g*) *Ide* v. *Chalmers* (1900), 5 Com. Cas. 212, 216 (where it was found as a fact that this clause is one which is usually inserted in Lloyd's policies).

(*h*) See the text, *supra*.

(*i*) *Spitta* v. *Woodman* (1810), 2 Taunt. 416; *Robertson* v. *French*, *supra*; *Horneyer* v. *Lushington* (1812), 15 East, 46; *Langhorn* v. *Hardy* (1812), 4 Taunt. 628; *Mellish* v. *Allnutt* (1813), 2 M. & S. 106; *Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651; *Gladstone* v. *Clay* (1813), 1 M. & S. 418, 424. As to the limits of the port or place mentioned as the *terminus a quo* at which the goods are to be loaded, see *Sailing-ship "Garston" Co.* v. *Hickie* (1885), 15 Q. B. D. 580, C. A.; *Payne* v. *Hutchinson* (1808), 2 Taunt. 405, n.; *Constable* v. *Noble* (1810), 2 Taunt. 403; *Moxon* v. *Atkins* (1812), 3 Camp. 200.

future cases (*j*). At any rate, if there be anything in the policy to indicate that it was intended to cover goods loaded at some place other than the *terminus a quo*, effect will be given to that intention (*k*); and in particular when it appears from the policy that the parties contemplated loading and unloading, bartering or trading with goods at any intermediate ports or places in the course of the insured voyage, the policy will attach not only on goods loaded at the *terminus a quo*, but also on those loaded at any of the ports or places where the ship is empowered to touch and trade under the terms of the policy (*l*).

Policy from a foreign port for the homeward voyage.

761. A policy on goods at and from a foreign port for the homeward voyage protects only the homeward cargo, and protects it only from the time when such cargo is wholly or partially loaded on board at the foreign port (*m*).

In a policy on a voyage during which goods are intended to be loaded and bartered at different places, there is commonly a clause, "outward cargo is to be considered homeward interest twenty-four hours after arrival at first place of trade." The effect of this clause is that the policy will simultaneously cover the original and the new cargoes on board, but not any goods which are on land and are not shipped goods (*n*).

Continuation and end of risk on goods.

762. According to the common clause in English policies, the risk on goods continues during the voyage to the port of discharge "until the same be there discharged and safely landed."

The port of discharge.

The port of discharge is either the particular port which is named in the policy for that purpose, or that which, by reason of the terms of the policy or the usage of trade, is inferred to be intended by the parties. Sometimes the place named in the policy as the place of discharge is a district containing several ports. In such case the policy will, generally speaking, protect the outward cargo until the whole of it has been or, in the usual course of trade, ought to have been safely landed at that port in the district which, for the aforesaid reasons, is taken to be the ultimate port of discharge contemplated by the parties (*o*).

(*j*) *Carr* v. *Montefiore* (1864), 5 B. & S. 408, 430, Ex. Ch. If the goods, though originally loaded elsewhere, are wholly, or in part, first landed and then reloaded at the *terminus a quo* of the voyage, this is a sufficient loading on board the ship at that port to make the policy attach (*Carr* v. *Montefiore*, *supra*; *Nonnen* v. *Reid*, *Nonnen* v. *Kettlewell* (1812), 16 East, 176, applied in the above case).

(*k*) *Bell* v. *Hobson* (1812), 16 East, 240; *Joyce* v. *Realm Insurance Co.* (1872), L. R. 7 Q. B. 580.

(*l*) *Gladstone* v. *Clay* (1813), 1 M. & S. 418; *Violett* v. *Allnutt* (1811), 3 Taunt. 419; *Grant* v. *Delacour* (1806), 1 Taunt. 466; *Grant* v. *Paxton* (1809), 1 Taunt. 463; *Barclay* v. *Stirling* (1816), 5 M. & S. 6; *Leathly* v. *Hunter* (1831), 7 Bing. 517, Ex. Ch. (a leading case on the subject).

(*m*) *Forbes* v. *Cowie* (1808), 1 Camp. 520; *Forbes* v. *Aspinall* (1811), 13 East, 323 (homeward freight); *Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651.

(*n*) *Tobin* v. *Harford* (1864), 17 C. B. (N. S.) 528, Ex. Ch.; *Joyce* v. *Realm Insurance Co.*, *supra*; compare *Harrison* v. *Ellis* (1857), 7 E. & B. 465.

(*o*) *Barrass* v. *London Assurance* (1782), 1 Park on Marine Insurance, 8th ed., p. 74; *Leigh* v. *Mather* (1795), 1 Park on Marine Insurance, 8th ed., p. 74; *Richardson* v. *London Assurance Co.* (1814), 4 Camp. 94; compare *Oliverson* v.

SECT. 10. Commencement, Duration, and Area of Risk.

Landing in customary manner.

Carriage from ship to shore.

763. The goods are "discharged and safely landed" within the meaning of the above clause when they are landed in the customary manner (*p*). They are landed in the customary manner if delivered on shore at the ordinary quays, wharves, or customary landing places within the limits of the port of discharge (*q*).

It is frequently necessary on account of the shallowness of the water to employ smaller craft, such as lighters or shallops, or sometimes men, to carry the goods from the ship to the shore. When this is done in the manner usual at the port of discharge, the underwriters are liable for any loss which may happen to the goods in the course of their being so carried (*r*).

Receipt of goods by consignee in his own lighters.

764. Sometimes the consignee himself takes possession of the goods by receiving them out of the ship into his own lighters. In such case the goods are not protected by the ordinary clause of the policy during their carriage in the lighters (*s*), unless, at least, it is customary at the port of discharge for the consignee to send his own lighters for landing his goods (*t*). But where (as is very usual) the policy contains the clause "including risk of craft to and from the ship," the goods are protected when carried in the consignee's own lighters, whether such custom prevails or not, since otherwise no effect would be given to those words (*a*).

Special clause as to continuation of risk.

765. Whenever the goods are safely landed in the ordinary course of business at the port of destination, the risk ends, though they have never been delivered into the hands of the consignees (*b*). And even where, as is often the case, the policy contains the clause

Brightman (1846), 8 Q. B. 781; and see *Brown* v. *Vigne* (1810), 12 East, 283 (policy on ship).

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 5. See further as to this rule, *infra*. If not so landed the risk ceases (*ibid.*).

(*q*) *Hyde* v. *Trent and Mersey Navigation Co.* (1793), 5 Term Rep. 389, 395, 397, 400; *Bourne* v. *Gatliffe* (1841), 3 Man. & G. 643, Ex. Ch.; (1844), 7 Man. & G. 850, H. L.

(*r*) *Pelly* v. *Royal-Exchange Assurance Co.* (1757), 1 Burr. 341, *per* Lord MANSFIELD, at pp. 348, 349, citing *Tierney* v. *Etherington* (1743); *Lane* v. *Nixon* (1866), L. R. 1 C. P. 412; *Rucker* v. *London Assurance Co.* (1784), 2 Bos. & P. 432, n.; *Hurry* v. *Royal Exchange Assurance Co.* (1801), 2 Bos. & P. 430; *Matthie* v. *Potts* (1802), 3 Bos. & P. 23; *Stewart* v. *Bell* (1821), 5 B. & Ald. 238.

(*s*) *Sparrow* v. *Caruthers* (1745), 2 Stra. 1236; *Hurry* v. *Royal Exchange Assurance Co., supra; Strong* v. *Natally* (1804), 1 Bos. & P. (N. R.) 16; *Houlder* v. *Merchants Marine Insurance Co.* (1886), 17 Q. B. D. 354, 356, C. A.

(*t*) *Paul* v. *Insurance Co. of North America* (1899), 15 T. L. R. 534. There is a *dictum* of the Court of Appeal in *Houlder* v. *Merchants Marine Insurance Co., supra*, that by taking delivery short of the shore the consignee determines the risk insured, because he waives the landing and himself terminates the risk by so doing. This is an *obiter dictum*, and the editors of Arnould on Marine Insurance, in s. 458, are, it is submitted, right in saying that the real question, at any rate in the absence of the "risk of craft" clause, is whether the goods have been landed in the customary manner at the port of discharge.

(*a*) *Paul* v. *Insurance Co. of North America, supra.*

(*b*) *Brown* v. *Carstairs* (1811), 3 Camp. 161; *Marten* v. *Nippon Sea and Land Insurance Co., Ltd.* (1898), 3 Com. Cas. 164; *Harrison* v. *Ellis* (1857), 7 E. & B. 465; *Australian Agricultural Co.* v. *Saunders* (1875), L. R. 10 C. P. 668, Ex. Ch. (but not if the landing is in the usual course of the voyage); *Pelly* v. *Royal-Exchange Assurance Co., supra; Brough* v. *Whitmore* (1791), 4 Term Rep. 206.

"until safely delivered to consignees," the placing of the goods in a customs warehouse is a safe delivery within the meaning of the clause (*c*).

Goods must be landed within a reasonable time.

766. The goods must be landed not only in the customary manner, but also within a reasonable time after their arrival at the port of discharge (*d*), the extent of such reasonable time depending upon the nature and usages of the trade on which the ship is engaged, the object of the adventure, and the circumstances existing at the port of discharge (*e*).

Goods covered during and after transhipment.

767. When a policy gives express leave to tranship, the goods remain covered by the policy both in the course of transhipment and when on board the vessel into which they are transhipped (*f*).

But not if transhipped into vessels for another port.

But where, in the absence of such express leave, under a policy providing for "all risk of craft until the goods are discharged and safely landed," the goods are put into lighters at the port of destination, not for the purpose of being landed, but for transhipment into vessels bound for another port, the loss of the goods when in such lighters is not covered by the policy, for such transhipment in fact amounts to the abandonment of the insured voyage (*g*).

Transhipment necessary by reason of peril insured.

On the other hand, although the policy contains no such express licence to tranship, the goods will nevertheless remain covered, if transhipment becomes necessary by reason of a peril insured against. Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and reshipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment (*h*).

Protection during land transit.

By the insertion of express words in a marine policy its protection may be prolonged after the landing of the goods and during their subsequent transport overland (*i*).

(*c*) *Marten* v. *Nippon Sea and Land Insurance Co., Ltd.* (1898), 3 Com. Cas. 164. See, also, as to the still more extensive "warehouse to warehouse" clause, p. 384, *ante*.

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 5. See *Parkinson* v. *Collier* (1797), 2 Park on Marine Insurance, 8th ed., p. 653 (as to African barter trade); *Noble* v. *Kennoway* (1780), 2 Doug. (K. B.) 510.

(*e*) See title CUSTOM AND USAGES, Vol. X., pp. 274 *et seq.*, 290 *et seq.*

(*f*) *Tierney* v. *Etherington* (1743), 1 Burr. 348, 349 (there cited by Lord MANSFIELD); *Oliverson* v. *Brightman* (1846), 8 Q. B. 781; *Bold* v. *Rotheram* (1846), 8 Q. B. 781, 797; *Neale and Wilkinson* v. *Rose* (1898), 3 Com. Cas. 236; compare *Australian Agricultural Co.* v. *Saunders* (1875), L. R. 10 C. P. 668, 676, Ex. Ch.

(*g*) *Houlder* v. *Merchants Marine Insurance Co.* (1886), 17 Q. B. D. 354, C. A. It is submitted that the true ground of decision in that case is that stated in the text; see *Bold* v. *Rotheram*, *supra*, at p. 808.

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 59. See also *Plantamour* v. *Staples* (1781), 1 Term Rep. 611, n.; *Bold* v. *Rotheram*, *supra*, at p. 808; *De Cuadra* v. *Swann* (1864), 16 C. B. (N. S.) 772.

(*i*) *Rodocanachi* v. *Elliott* (1873), L. R. 8 C. P. 649; *Simon, Israel & Co.* v. *Sedgwick*, [1893] 1 Q. B. 303, C. A. In *Wingate* v. *Foster* (1878), 3 Q. B. D. 582, C. A., where a policy contained a special clause to protect certain pumps used in salvage operations, an attempt was made to apply this doctrine to their

SECT. 10.

(ii.) *Commencement and Duration of Risk on Ship.*

Commencement, Duration, and Area of Risk.

768. Where the subject-matter is insured "from" a particular place the risk does not attach until the ship starts on the voyage insured (*j*). The ship is not deemed to have started on the voyage until she has, being in a state of complete preparation for the insured voyage, quitted her moorings and broken ground (*k*).

When insured "from" a particular place.

769. When a ship is insured "at and from" (*l*) a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival (*m*).

When insured "at and from" a particular place.

Good safety.

The ship is deemed to be in good safety, although seriously damaged, if she be in such a condition as to enable her to lie at the *terminus a quo* in reasonable security till she is properly repaired and equipped for her insured voyage (*n*).

transit to a port of refuge not provided for by the policy, but it was held that this formed no part of the insured voyage; and, as will be shown later (see p. 395, *post*), the risk is always put an end to by unexcused deviation or by abandonment of the voyage insured. As to the effect of transferring the property in the goods before the loss and without assigning the policy, see *Ionides* v. *Harford* (1859), 29 L. J. (EX.) 36; *North of England Oil-cake Co.* v. *Archangel Insurance Co.* (1875), L. R. 10 Q. B. 249; and p. 360, *ante*.

(*j*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 2.

(*k*) As to what constitutes a starting or sailing on the insured voyage, see *Pittegrew* v. *Pringle* (1832), 3 B. & Ad. 514; *Cockrane* v. *Fisher* (1835), 1 Cr. M. & R. 809, Ex. Ch.; *Hunting & Son* v. *Boulton* (1895), 1 Com. Cas. 120; *Sea Insurance Co.* v. *Blogg*, [1898] 2 Q. B. 398, C. A., and p. 419, *post*.

(*l*) As to insurances "at," and "only against harbour risks," see note (*n*), p. 392, *post*.

(*m*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 3 (a), (b), which is in accordance with *Haughton* v. *Empire Marine Insurance Co.* (1866), L. R. 1 Exch. 206. But where the vessel is covered by successive policies with the same underwriter it may be held that the later was intended to attach in substitution for the earlier (*Union Marine Insurance Co.* v. *Martin* (1866), 35 L. J. (C. P.) 181).

(*n*) *Forbes* v. *Wilson* (1800), 1 Park on Marine Insurance, 8th ed., p. 472; *Annen* v. *Woodman* (1810), 3 Taunt. 299. R. 3, like the other rules in Sched. I., to the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), is applicable to Lloyd's policy set out in the Schedule (*ibid.*), and this contains the clause "lost or not lost." Nevertheless, it seems probable from ss. 6 and 30 (*ibid.*) that under a policy "at and from," . . . "lost or not lost," the risk attaches as from the earliest time when the ship was in the *terminus a quo* in good safety. See the discussion on this point in Arnould on Marine Insurance, s. 475.

In *Bell* v. *Bell* (1810), 2 Camp. 475, there was a policy on ship "at and from Riga to the United Kingdom." The ship arrived at Riga on 28th May, 1809; and, pursuant to a recent order of the Russian Government, her papers were sent to St. Petersburg to be examined before her cargo was unloaded. On 9th August ship and cargo were put under sequestration, and on 4th December they were seized and sold under a sentence of condemnation for want of proper documents, the cargo being still undischarged. Lord ELLENBOROUGH, C.J., ruled that the policy attached because the ship was in physical safety from the perils insured against, although not free from political danger. It will be seen (see p. 390, *post*) that in order to discharge an underwriter on a ship insured until "moored twenty-four hours in good safety" she must be not only in physical safety, but also in political safety, in so far that the underwriter remains liable if she has been laid under an embargo, or if steps have been taken to seize her

The application, however, of this rule, which determines only the *primâ facie* meaning of the clause "at and from," may be excluded or modified by the terms of the policy construed by the light of the surrounding circumstances (*o*).

770. Where the ship is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that she should be at that place when the contract is concluded (*p*), but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the insurance. This implied condition, however, may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition (*q*).

Adventure must be commenced within a reasonable time.

The question arises by what test a reasonable time is to be determined. Before the passing (*r*) of the Act (*s*) it had been decided that the contract was voidable if the delay in arriving at the port where the insured risk was to commence was such as materially to alter the risk, for instance to change a summer risk into a winter risk, and this although the delay was occasioned by perils of the seas or other unavoidable causes (*t*).

What is a reasonable time.

It has still to be decided whether this remains the test under the Act, or whether the policy is only avoided by any delay which could be prevented by reasonable care and skill (*u*); but, in any case, when the policy has once attached by the ship's arrival at the port where the insured risk is to commence, a detention there for a reasonable time for the purpose of the insured adventure is allowed, and whether the time is reasonable is a question of fact to be determined by the state of things existing in the port (*v*).

so that she is no longer in the possession and control of her owner (see cases cited in note (*f*) p. 391, *post*); and it seems somewhat doubtful whether under r. 3 in the Schedule to the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), the policy attaches at a time when, though the ship is in physical safety, the assured is by the act of a political authority deprived of possession or control of her.

(*o*) *Hunting & Son* v. *Boulton* (1895), 1 Com. Cas. 120, 122.

(*p*) See the text, *supra*.

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 42; this provision settles one of the points left undecided in *De Wolf* v. *Archangel Insurance Co.* (1874), L. R. 9 Q. B. 451.

(*r*) 21st December, 1906.

(*s*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41).

(*t*) *Hull* v. *Cooper* (1811), 14 East, 479; *De Wolf* v. *Archangel Insurance Co.*, *supra*; *Maritime Insurance Co.* v. *Stearns*, [1901] 2 K. B. 912.

(*u*) This question is discussed in Arnould on Marine Insurance, s. 480, where the editors express an opinion that the test of reasonable time, as used in the above-mentioned rule, is whether the risk has been materially altered. But it is to be observed that, by the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 88, the question what is a reasonable time is a question of fact (as to which see Lord WATSON'S judgment in *Hick* v. *Raymond and Reid*, [1893] A. C. 22, 32), and further, that reasonable time is in no other part of the Act made to depend upon the risk being materially altered. On the other hand, the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 42 (2), does seem to support to some extent the view put forward by the editors of Arnould on Marine Insurance.

(*v*) *Camden* v. *Cowley* (1763), 1 Wm. Bl. 417; *Cruickshank* v. *Janson* (1810), 2 Taunt. 301; *Warre* v. *Miller* (1825), 4 B. & C. 538; *Brown* v. *Tayleur* (1835), 4 Ad. & El. 241; *Raine* v. *Bell* (1808), 9 East, 195; *Phillips* v. *Irving* (1844),

SECT. 10. Commencement, Duration, and Area of Risk.

Meaning of words in designating the port at which the risk attaches.

771. When the terminus "at and from" which the voyage is to commence is a port named in the policy, the name is, as a general rule, presumed to mean that place which in the ordinary commercial sense is considered the port, and not to extend to all the different places it may comprise for purposes of revenue, or which may be included in the technical legal meaning of the word "port" (*a*).

District containing several ports.

Where the policy is "at and from" an island or other district containing several ports, the risk on ship commences as soon as the ship has arrived in good safety at the first port at which she touches on the island, for the purpose of discharging her outward cargo. Thus a ship insured for a homeward voyage "at and from" any of the West India Islands is protected by the word "at" in going from port to port of the island (*b*).

Modification of rules.

772. The general rules as to when policies attach, like all other rules of construction, are subject to be modified by the usage of particular trades (*c*).

Termination of risk by completion of the voyage.

"Moored in good safety."

773. In Lloyd's policy and in all common voyage policies the risk on ship is expressed to continue "until she hath moored at anchor twenty-four hours in good safety" (*d*), and the ship is not deemed to have been moored for twenty-four hours in good safety unless she has been moored for that space of time under the three following conditions :—

Physical safety.

(1) In such a state of physical safety that she can keep afloat

7 Man. & G. 325, 328 ; it seems that delay in executing repairs at the port will not put an end to the risk unless the delay is such as to amount to an abandonment of the insured adventure (*Chitty* v. *Selwyn* (1742), 2 Atk. 359, *per* Lord HARDWICKE, L.C. ; *Grant* v. *King* (1802) 4 Esp. 175 ; *Smith* v. *Surridge* (1801), 4 Esp. 25). See also *Palmer* v. *Marshall* (1832), 8 Bing. 317 ; and *Palmer* v. *Fenning* (1833), 9 Bing. 460, *per* PARK, J., at p. 462 (where the delay discharged the underwriters).

(*a*) *Constable* v. *Noble* (1810), 2 Taunt. 403 ; *Payne* v. *Hutchinson* (1808), 2 Taunt. 405, n. ; *Brown* v. *Tayleur* (1835), 4 Ad. & El. 241 ; *Kingston-upon-Hull Dock Co.* v. *Browne* (1831), 2 B. & Ad. 43 ; *Stockton and Darlington Rail. Co.* v. *Barrett* (1844), 7 Man. & G. 870, H. L. ; *Van Baggen* v. *Baines* (1854), 9 Exch. 523 ; *Sailing-ship "Garston" Co.* v. *Hickie* (1885), 15 Q. B. D. 580, C. A. ; *Hunter* v. *Northern Marine Insurance Co.* (1888), 13 App. Cas. 717, 722, 726, 733 ; see also *Kingston* v. *Knibbs* (1808), 1 Camp. 508, n. ; *Cockey* v. *Atkinson* (1819), 2 B. & Ald. 460 ; *De Longuemere* v. *Firemen Insurance Co.* (1813), 10 Johnson's Reports (New York), 126 ; *Sea Insurance Co. of Scotland* v. *Gavin* (1830), 4 Bli. (N. S.) 578, H. L. ; *Maritime Insurance Co., Ltd.* v. *Alianza Insurance Co. of Santander*, [1907] 2 K. B. 660 ; compare *Roelandts* v. *Harrison* (1854), 9 Exch. 444.

(*b*) *Camden* v. *Cowley* (1763), 1 Wm. Bl. 417 ; *Warre* v. *Miller* (1825), 4 B. & C. 538 ; see also *S.S. Kynance Co., Ltd.* v. *Young* (1911), 27 T. L. R. 306.

(*c*) Thus, in the Newfoundland trade, owing to the well-known practice of making fishing expeditions or intermediate trading voyages after the ship's first arrival off the coast of Newfoundland, the risk under policies for the homeward voyage, though expressed to be "at and from" any port or ports in Newfoundland, was held not to attach upon the ships on their first arrival out, but only from their beginning to prepare for the homeward voyage (*Vallance* v. *Dewar* (1808), 1 Camp. 503). See, generally, title CUSTOM AND USAGES, Vol. X., pp. 274 *et seq.*, 290 *et seq.* As to what is meant by the words "preparing for the ship's voyage" in a clause describing the commencement of the risk, see *Lambert* v. *Liddard* (1814), 5 Taunt. 480, 486.

(*d*) As to the termination of the risk by deviation, delay, and abandonment of the voyage, see p. 395, *post*.

while the cargo is being unloaded. This condition is not satisfied when the vessel arrives as a mere wreck and is in a sinking state when she is moored, but it is satisfied if she arrives at the ordinary place of discharge, and, though seriously damaged, is able there to keep afloat, and is kept afloat more than twenty-four hours after being so moored (*e*).

Political safety.

(2) The ship must have been for the twenty-four hours in a state of political safety. This condition, therefore, is not satisfied if she has been laid under an embargo, or if steps have been taken to seize her so that she is no longer in the possession and control of her owners (*f*).

Opportunity of unloading and discharging.

(3) She must have been moored for more than twenty-four hours in such circumstances that she has an opportunity of unloading and discharging at the place where she in fact intends to discharge. This condition, for instance, is not satisfied, if she has been ordered into quarantine during the twenty-four hours (*g*).

If, however, the ship be moored in such a place and in such circumstances that she has only to wait till her turn for unloading comes without again unmooring, this is held to be a mooring in good safety (*h*).

Risk may be extended by express stipulations in the policy.

774. The risk, however, may be prolonged for a period of time beyond the termination of the insured voyage by express stipulations in the policy (*i*), or by usage annexing incidents to the contract (*k*). In the former case effect will, in the absence of some reason to the contrary, be given to the printed "twenty-four hours" clause by making the period contained in the express stipulation run from the expiration of twenty-four hours after the ship has moored at anchor (*l*).

(*e*) *Shawe* v. *Felton* (1801), 2 East, 109; *Lidgett* v. *Secretan* (1870), L. R. 5 C. P. 190, 198, 199, 200.

(*f*) *Minett* v. *Anderson* (1794), Peake, 277; *Horneyer* v. *Lushington* (1812), 15 East, 46, 47; and see *Lockyer* v. *Offley* (1786), 1 Term Rep. 252. It seems clear that mere liability to seizure is not inconsistent with "good safety." See *Lockyer* v. *Offley*, *supra*, *per* WILLES, J., at p. 261; *Lidgett* v. *Secretan*, *supra*, *per cur.*, at p. 199.

(*g*) *Samuel* v. *Royal Exchange Assurance Co.* (1828), 8 B. & C. 119; *Whitwell* v. *Harrison* (1848), 2 Exch. 127; *Lindsay* v. *Janson* (1859), 4 H. & N. 699; *Stone* v. *Marine Insurance Co., Ocean Ltd., of Gothenburg* (1876), 1 Ex. D. 81. If the twenty-four hours be struck out of the policy the risk will cease as soon as she is at her moorings in safety (*ibid.*, at p. 85); compare *Cornfoot* v. *Royal Exchange Assurance Corporation*, [1904] 1 K. B. 40, C. A.

(*h*) *Angerstein* v. *Bell* (1795), 1 Park on Marine Insurance, 8th ed., p. 54.

(*i*) Such stipulations have been considered in *Mercantile Marine Insurance Co.* v. *Titherington* (1864), 5 B. & S. 765; *Gambles* v. *Ocean Marine Insurance Co. of Bombay* (1876), 1 Ex. D. 141, C. A.; *Hunter* v. *Northern Marine Insurance Co.* (1887), 14 R. (Ct. of Sess.) 544; *Cornfoot* v. *Royal Exchange Assurance Corporation*, *supra*.

(*k*) *Preston* v. *Greenwood* (1784), 4 Doug. (K. B.) 28; *Pelly* v. *Royal-Exchange Assurance Co.* (1757), 1 Burr. 341; *Brough* v. *Whitmore* (1791), 4 Term Rep. 206; and see p. 344, *ante*.

(*l*) *Mercantile Marine Insurance Co.* v. *Titherington*, *supra*. This question was left open in *Lidgett* v. *Secretan*, *supra*, at p. 190, 199; but no doubt was thrown upon the former case. The days of the extended period are reckoned as periods of twenty-four hours from the termination of the voyage risk (*Cornfoot* v. *Royal Exchange Assurance Corporation*, *supra*, where the twenty-four hours clause was struck out).

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Where the ship is insured to an island or other district comprising several ports, the risk will continue until the ship has moored twenty-four hours in good safety at the port at which she was intended to unload and at which the master actually breaks bulk for the purpose of unloading the whole or the greater part of her cargo (*m*).

Island or district comprising several ports.

A policy on ship to ports in a specified country or district may, however, be so worded that the risk does not end even at the last port of discharge; for instance, the insurance may be to any "port or ports on the west coast of South America and for thirty days after arrival in final port however employed." In such case the last two words will prevent the other words, "port or ports," "final port," from being limited to ports of discharge (*n*).

(iii.) *Commencement and Duration of Risk on Freight.*

Commencement of insurance on freight.

775. In order to recover on a policy on freight, the assured must not only have an insurable interest at the time of the loss, but the policy must be so worded as to make the risk attach before the loss. Thus where a policy which is effected on freight "at and from" a certain port of loading also contains a clause that the freight is to be covered "from the time of the engagement of the goods," the assured has an insurable interest as soon as the goods are engaged, but he cannot recover for a loss of freight due to the loss of the ship, if such loss occurs before she has reached the port of loading (*o*).

Marine Insurance Act, 1906.

When freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro ratâ* as the goods or merchandise are

(*m*) *Camden* v. *Cowley* (1763), 1 Wm. Bl. 417; *Barrass* v. *London Assurance* (1782), 1 Park on Marine Insurance, 8th ed., p. 74; *Leigh* v. *Mather* (1795), 1 Park on Marine Insurance, 8th ed., p. 74; *Inglis* v. *Vaux* (1813), 3 Camp. 437; *Moore* v. *Taylor* (1834), 1 Ad. & El. 25; and see note (*l*), p. 391, *ante*. Sometimes the ship is insured to her "port of discharge" or her "port or ports of discharge" or to her final "port of discharge or destination." As to the meaning which has been given to these words, see *Clason* v. *Simmonds* (1742), 6 Term Rep. 533; *Moffat* v. *Ward* (1784), 4 Doug. (K. B.) 29, n.; *Preston* v. *Greenwood* (1784), 4 Doug. (K. B.) 28, 33; *Moore* v. *Taylor*, *supra*. The words "last port of discharge" have been held to mean the last practicable friendly port of discharge (*Browne* v. *Vigne* (1810), 12 East, 283, *per* BAYLEY, J., at p. 288), because a hostile port could not have been in the contemplation of the parties at the time the policy was effected (*Neilson* v. *De Lacour* (1798), 2 Esp. 619).

(*n*) *Crocker* v. *Sturge*, [1897] 1 Q. B. 330; *Spalding* v. *Crocker* (1897), 2 Com. Cas. 189; and see *Crocker* v. *General Insurance Co., Ltd., of Trieste* (1897), 3 Com. Cas. 22, C. A. Sometimes the insurance is only "at" a place, and sometimes only against harbour risks. As to when the risk terminates in such insurance, see *Maritime Insurance Co., Ltd.* v. *Alianza Insurance Co. of Santander*, [1907] 2 K. B. 660; *Hunting & Son* v. *Boulton* (1895), 1 Com. Cas. 120; *S.S. Kynance Co., Ltd.* v. *Young* (1911), 27 T. L. R. 306. Ships are also sometimes insured against fire when in dock or when in river with liberty to go into a dry dock, or sometimes in harbour while securely moored. As to when the risk in such cases terminates, see —— v. *Westmore* (1807), 6 Esp. 109; *Pearson* v. *Commercial Union Assurance Co.* (1876), 1 App. Cas. 498; *Grant* v. *Ætna Insurance Co.* (1862), 15 Moo. P. C. C. 516.

(*o*) *The Copernicus*, [1896] P. 237, C.A.; compare *Jones* v. *Neptune Marine Insurance Co.* (1872), L. R. 7 Q. B. 702.

shipped, provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo (*p*).

Cover on freight on goods not shipped. Essentials.

In order, therefore, that the policy may cover freight on goods not shipped two conditions must be fulfilled before or at the time of the loss: (1) the goods must belong to the shipowner or there must be a binding contract with some other person to ship them; (2) the goods must be in readiness to be shipped and the ship must be also ready to receive them.

As regards the first condition, this rule is in accordance with decided cases (*q*).

As regards the second condition, this rule, if interpreted according to the ordinary meaning of the words, overrules certain cases (*r*) which decided that, although the ship be not ready to receive the goods, the policy will nevertheless cover the freight in respect of these, if there be a binding contract for the shipment of them.

It has to be seen whether the English courts, in order to make the rule accord with the decided cases, will think it right to give a very strained interpretation to the word "ready," by holding that the goods are ready to be shipped and the ship is ready to receive them, if, but for the perils insured against, the goods would in the ordinary course of things have been shipped on board the vessel.

Insurable interest in and commencement of risk on chartered freight.

776. Where the interest insured is chartered freight, that is to say, freight to be paid to the shipowner by the terms of a charterparty for the use of his ship or part of it on a voyage therein described, there is an insurable interest in the freight at the time of the inception of the voyage so described. Thus, where by the terms of the charterparty the ship is to proceed from A. to B. and at B. to take a cargo for C., there is an insurable interest in the freight of this cargo as soon as the ship breaks ground at A. to proceed to B. (*s*).

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 3 (d).

(*q*) The principal cases on this subject are *Montgomery* v. *Eygington* (1739), 3 Term Rep. 362 (which virtually overruled the decision of LEE, J., in *Tonge* v. *Watts* (1746), 2 Stra. 1251); *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45; *Forbes* v. *Aspinall* (1811), 13 East, 323; *Patrick* v. *Eames* (1813), 3 Camp. 441.

(*r*) These cases are *Parke* v. *Hebson* (1820), cited in *Truscott* v. *Christie* (1820), 2 Brod. & Bing. 320 at p. 326; *Truscott* v. *Christie* (1820), 2 Brod. & Bing. 320; *Warre* v. *Miller* (1825), 4 B. & C. 538; *De Vaux* v. *J'Anson* (1839), 5 Bing. (N. C.) 519; *Flint* v. *Flemyng*, *supra*. For instance, in *Truscott* v. *Christie*, *supra*, at the time of the loss, the vessel was being altered to make her able to accommodate two hundred invalids. The alterations were not completed at the time of the loss, yet the court held that the assured could recover on a policy on the passage money. Again, in *De Vaux* v. *J'Anson*, *supra*, although the ship was at the time of the loss in dry dock and not in the place where she was to receive her cargo, yet the assured recovered under a policy on freight. It is, on the other hand, to be observed that the rule in question is in accordance with the *dictum* of Lord ELLENBOROUGH, C.J., in *Forbes* v. *Aspinall*, *supra*, at p. 331, and with the ruling of Lord LYNDHURST, C.B., in *Williamson* v. *Innes* (1831), 8 Bing. 81, n.; Lord ELLENBOROUGH'S *dictum*, however, was not necessary for the decision of the case, and Lord LYNDHURST'S ruling was only a ruling at Nisi Prius.

(*s*) *Thomson* v. *Taylor* (1795), 6 Term Rep. 478; *Horncastle* v. *Suart* (1806), 7

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In short, there is an insurable interest in chartered freight as soon as the ship commences the voyage which she must make in order to acquire an inchoate right to the chartered freight (*t*).

Time when policy attaches on chartered freight.

777. Whether the policy has at the time of the loss attached on the insurable interest in freight depends upon the terms of the policy. When the policy is on chartered freight and the insurance is "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately; if she is not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety (*a*).

An insurance on freight "at and from" a place does not cover the freight on a voyage terminating at that place, for that freight is not at risk on the voyage described in the policy. Thus when freight was insured at and from Riga to the United Kingdom and the ship was captured at Riga, it was held that the policy did not cover the freight on the outward voyage to Riga (*b*).

In policies on chartered freight the commencement of the risk

East, 400; *Atty* v. *Lindo* (1805), 1 Bos. & P. (N. R.) 236; *Mackenzie* v. *Shedden* (1810), 2 Camp. 431; *Davidson* v. *Willasey* (1813), 1 M. & S. 313; *Foley* v. *United Fire etc. Insurance Co.* (1870), L. R. 5 C. P. 155, Ex. Ch.; *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83.

(*t*) See cases cited in note (*s*), p. 393, *ante*, and *Barber* v. *Fleming* (1869), L. R. 5 Q. B. 59, where BLACKBURN, J., at p. 71, refers to Phillips, Law of Insurance, ss. 328, 335, and says: "When a shipowner has got a contract with another person under which he will earn freight, and has taken steps and incurred expense on the voyage towards earning it, then his interest ceases to be a contingent thing, but becomes an inchoate interest, and is an interest which, if afterwards destroyed by one of the perils insured against, is lost and ought to be paid for by the underwriters," because, as he adds in *Barber* v. *Fleming*, *supra*, at p. 73, the interest "is no longer speculative," but the assured has actually begun to do something which makes the inchoate interest attach and makes it a real thing.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 3 (c). This rule must of course be read subject to r. 1 (*ibid.*) (see note (*n*), p. 368, and p. 388, *ante*), and subject also to any conditions precedent to the liability of the underwriter, such as the seaworthiness of the ship etc. The following are illustrations of its operation. In *Rankin* v. *Potter*, *supra*, it was agreed by charterparty that the "Sir William Eyre," then on a voyage from the Clyde to New Zealand, should proceed to New Zealand with a cargo for owner's benefit, and thence to Calcutta, and there load a cargo for Liverpool for the freighter. The owners of the ship effected a policy on homeward chartered freight from Calcutta to Liverpool, at and from the Clyde to Otago, New Zealand, and for thirty days in port there after arrival. At New Zealand the vessel grounded, and received such damage by sea perils as to become a constructive total loss, and in the result she was not repaired, and the homeward freight was not earned. It was not disputed that there was an insurable interest in such freight, and the House of Lords decided that the plaintiff was entitled to recover under the policy for a total loss of freight, inasmuch as the right to the chartered freight was destroyed by the total loss of the ship during the insured voyage. Again, in *Barber* v. *Fleming*, *supra*, a ship lying at Bombay was chartered to carry a cargo of guano from Howland's Island to the United Kingdom. A policy was effected "on freight chartered or otherwise" at and from Bombay to Howland's Island while there, and thence to the United Kingdom. The ship sailed in ballast from Bombay to Howland's Island, and was lost on the voyage thither. It was held that the assured could recover under the policy for the loss of the chartered freight. See also *Sellar* v. *M'Vicar* (1804), 1 Bos. & P. (N. R.) 23 (ship never arrived at the *terminus a quo* of the insured voyage); *Hydarnes Steamship Co.* v. *Indemnity Mutual Marine Assurance Co.*, [1895] 1 Q. B. 500, C. A.

(*b*) *Bell* v. *Bell* (1810), 2 Camp. 475.

may be made to depend on a certain event, for instance, the loading of the goods on board ship at a certain port or simply from the loading of the vessel. In such cases the risk does not attach until the happening of the specified event (*c*).

778. Under a voyage policy on freight, unless there be some stipulation to the contrary, the risk continues as long as the goods remain in the custody of the shipowner exposed to maritime perils, provided there be no unjustifiable delay in discharging them (*d*). In the case of a time policy on freight, the rules relating to the termination of the risk are the same as those which apply to insurances on ships (*e*).

Termination of risk on freight.

SUB-SECT. 3.—*The Voyage Insured; Change of Voyage; Deviation and Delay.*

779. A voyage policy must specify the voyage insured, that is to say, the voyage intended to be covered by the policy (*f*). It is however, only necessary that the place at which the voyage is to commence and the place at which it is to end should be stated. These places are respectively called the *terminus a quo* and the *terminus ad quem*. It is sufficient that these termini should be named in the policy, because the ship, in the absence of some provision to the contrary on the face of the policy, is bound to proceed from one terminus of the voyage insured to the other, in a direct course, with all due expedition, and without trading at any intermediate places, except such as may be sanctioned by a well-established usage of trade, of which the underwriter is presumed to be cognisant. Thus the proper course of the insured voyage, or, more briefly, the "insured voyage," is determined by the termini named in the policy and by the usage of the trade on which the ship is engaged (*g*).

The voyage.

Terminus a quo.

Terminus ad quem.

"The insured voyage."

When the place of departure is specified by the policy, and the ship, instead of sailing from that place, sails from any other place, the risk does not attach (*h*); nor does it attach when the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for another (*i*).

(*c*) *Beckett* v. *West of England Marine Insurance Co.* (1871), 25 L. T. 739; distinguished in *Hydarnes Steamship Co.* v. *Indemnity Mutual Marine Assurance Co.*, [1895] 1 Q. B. 500, C. A., and criticised by RIGBY, L.J., *ibid.*, at p. 509; *Hopper* v. *Wear Marine Insurance Co.* (1882), 46 L. T. 107; *Jones* v. *Neptune Marine Insurance Co.* (1872), L. R. 7 Q. B. 702.

(*d*) Marshall on Marine Insurance, 4th ed., p. 225; *Atty* v. *Lindo* (1805), 1 Bos. & P. (N. R.) 236. Advance freight paid under a charterparty may continue at risk, though a stage of the adventure has been accomplished, and cargo carried in that stage delivered (*Ellis* v. *Lafone* (1853), 8 Exch. 546, Ex. Ch.).

(*e*) *Michael* v. *Gillespy* (1857), 2 C. B. (N. S.) 627. For the definitions of voyage policy, see p. 336, *ante*, and the text, *infra*. For the definition of time policy, see p. 336, *ante*. For the rules relating to insurances on ships, see pp. 381, 388 *et seq.*, *ante*.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 23.

(*g*) *Fox* v. *Black* (1767), 2 Park on Marine Insurance, 8th ed., p. 620; *Clason* v. *Simmonds* (1742), 6 Term Rep. 533. As to the usage of trade, see p. 344, *ante*. The usage must be notorious and must be observed generally, not merely occasionally (*Salisbury* v. *Townson* (undated), 2 Park on Marine Insurance, 8th ed., p. 646).

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 43.

(*i*) *Ibid.*, s. 44. In both these cases the insured voyage has never been

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780. A departure from the proper course of the insured voyage may arise from what is called "a change of voyage" or from "deviation," and it is important to note the distinction between these two modes of departure, because of their very different effect on the underwriter's liability.

Change of voyage and deviation.

Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage (*k*).

Marine Insurance Act, 1906.

Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of the change, that is to say, as from the time when the determination to change is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs (*l*).

Change of voyage defined.

The consequences.

There is a deviation from the voyage contemplated by the policy (1) where the course of the voyage is specifically designated by the policy, and that course is departed from; or (2) where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from (*m*).

Deviation defined.

The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract (*n*).

The consequences.

Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation; and it is immaterial that the ship may have regained her route before any loss occurs (*o*).

Explanation of abandonment of voyage.

There is an abandonment of the voyage, when a purpose of abandoning the original place of destination (*p*) for some other place of discharge is definitely formed, and as soon as such purpose is definitely formed and manifested the underwriter is *ipso facto* discharged from liability for all subsequent losses (*q*). If the

entered upon. But in the second case, if the policy is "at and from" the port of departure, the risk has attached, and, looking at the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 45, it seems that the underwriter is not discharged from liability until the determination to change the port of destination has been manifested as definitely come to. If this be so, the law might be briefly expressed by saying that the abandonment of the port of destination in all cases discharges the insurer from any liability from the time when the assured shows by his conduct that such determination has been definitely come to. In the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), the term "change of voyage" is, however, confined to a change after the commencement of the risk (*ibid.*, s. 45 (1)), and this is in accordance with the meaning given to it by the Court of Appeal in *Simon, Israel & Co.* v. *Sedgwick*, [1893] 1 Q. B. 303, C. A.; and see *Tasker* v. *Cunninghame* (1819), 1 Bli. 87, H. L.

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 45 (1).

(*l*) *Ibid.*, s. 45 (2).

(*m*) *Ibid.*, s. 46 (2).

(*n*) *Ibid.*, s. 46 (3); *Thellusson* v. *Fergusson* (1780), 1 Doug. (K. B.) 361, 365.

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 46 (1). As to what are lawful excuses, see *ibid.*, s. 49, and p. 400, *post*. These statutory provisions (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 45, 46), which embody the law as it stood when they came into force (1st January, 1907), are explained and illustrated in the text, *infra*.

(*p*) *Wooldridge* v. *Boydell* (1778), 1 Doug. (K. B.) 16; *Driscol* v. *Passmore* (1798), 1 Bos. & P. 200.

(*q*) *Wooldridge* v. *Boydell*, *supra*; *Way* v. *Modigliani* (1787), 2 Term Rep. 30; *Bottomley* v. *Bovill* (1826), 5 B. & C. 210.

resolution is formed after the commencement of the risk, the voyage is said to be changed (*r*).

There is deviation when, without any design of abandoning the original destination, there is an actual departure from the course of the insured voyage, and in such case, whether the risk is increased by the deviation or not, the underwriter is discharged from liability for all losses occurring after such actual departure (*s*), but he remains liable for all previous losses (*t*).

Explanation of deviation of voyage.

It is a question of fact whether a departure from the proper course of the insured voyage constitutes an abandonment of the voyage or only a deviation, the question being whether or not a definite resolution was formed to abandon the *terminus ad quem* named in the policy (*u*).

781. In the absence of any stipulation in the policy, or any usage to the contrary, the ship is bound to proceed from one terminus of the voyage insured to the other in a direct course and without touching at any interjacent port, or pursuing any intermediate adventure (*a*). Notice to the underwriter of an intention to depart from the usual course (no liberty to do so being given by the policy) will not have the effect of preventing the underwriter from being discharged, although it may, with other circumstances, be evidence of his waiver of the condition not to deviate (*b*).

Ship bound to proceed on a direct course.

Policies of insurance now very commonly contain a clause by which the underwriter agrees to hold the assured covered, in case of deviation, abandonment, or change of voyage, at an extra premium to be afterwards arranged; and where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens, but no arrangement is made, then a reasonable additional premium is payable (*c*).

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 45 (1); *Tasker* v. *Cunninghame* (1819), 1 Bli. 87, 100, 102, H. L.

(*s*) *Hamilton* v. *Sheddon* (1837), 3 M. & W. 49; and see cases cited in note (*q*), p. 396, *ante*. Intention to deviate is not sufficient (*Thellusson* v. *Fergusson* (1781), 1 Doug. (K. B.) 361; *Kewley* v. *Ryan* (1794), 2 Hy. Bl. 343; *Foster* v. *Wilmer* (1746), 2 Stra. 1249; *Heselton* v. *Allnutt* (1813), 1 M. & S. 46, 50; *Hare* v. *Travis* (1827), 7 B. & C. 14; *Kingston* v. *Phelps* (1795), cited 7 Term Rep. 165); and see *Simpson Steamship Co.* v. *Premier Underwriting Association* (1905), 10 Com. Cas. 198 (same principle applied to breach of warranty in time policy).

(*t*) *Hare* v. *Travis*, *supra*; *Kingston* v. *Phelps*, *supra*.

(*u*) *Wooldridge* v. *Boydell* (1778), 1 Doug. (K. B.) 16. See also *Marsden* v. *Reid* (1803), 3 East, 572 (vessel insured to numerous ports; it is no change of voyage if she sail for one of them only, for a voyage to all or any of the places named is intended); and see cases cited in note (*q*), p. 396, *ante*, and note (*s*), *supra*. Where a marine policy on goods covered a land transit following a sea voyage, the Court of Appeal held that to determine whether the policy ever attached the *terminus ad quem* of the sea voyage only must be taken into consideration (*Simon, Israel & Co.* v. *Sedgwick*, [1893] 1 Q. B. 303, C. A.). The mere fact of taking in goods, and clearing out for a different port to that specified in the policy as the *terminus ad quem*, does not *per se* amount to a change of voyage (*Planché* v. *Fletcher* (1779), 1 Doug. (K. B.) 251; *Kewley* v. *Ryan*, *supra*).

(*a*) See, for example, *Brown* v. *Tayleur* (1835), 4 Ad. & El. 241; *Redman* v. *London* (1813), 3 Camp. 503; *sub nom. Redman* v. *Lowdon* (1814), 5 Taunt. 462.

(*b*) *Redman* v. *London*, *sub nom. Redman* v. *Lowdon*, *supra*.

(*c*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 31 (2). This fact renders

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The "touch and stay" clause.

In the absence of any further express licence (*d*), or any usage authorising a deviation, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the direct course of her voyage from the port of departure to the port of destination (*e*). This is also generally true when there is even a clause giving liberty "to touch and stay at any place for all purposes whatever" (*f*).

Principles.

The following are the principles which may be deduced from the cases on this subject:—

(1) The extent of the powers they confer on the ship is to be judged of, not so much by a literal and strict interpretation of the terms employed (such as "to call," "to touch," or "to touch and stay"), as by reference to the true scope and nature of the adventure contemplated by the policy (*g*).

(2) However extensive the language of these clauses may be, they can never confer a power of visiting ports out of that which, upon a proper construction of the whole policy, appears to have been the course of the voyage insured, as contemplated by the parties (*h*);

(3) Nor can they justify the ship in visiting any port, even though within the local limits of the voyage insured, for any purpose unconnected with the main object of the adventure (*i*).

(4) If the ship visits an allowed port for an allowed purpose, no trading, breaking bulk, landing or loading cargo, however alien to the main object of the adventure, will make the visit a deviation if

the subject of deviation far less important than it was formerly (see *Hyderabad (Deccan) Co.* v. *Willoughby*, [1899] 2 Q. B. 530). A clause that a ship shall be held covered in case of "deviation or change of voyage" at an extra premium has been held not to cover unreasonable delay before the commencement of the insured voyage (*Maritime Insurance Co.* v. *Stearns*, [1901] 2 K. B. 912); nor has it any operation where the risk has never attached (*Simon, Israel & Co.* v. *Sedgwick*, [1893] 1 Q. B. 303, 307, C. A.). The clause sometimes requires due notice to be given by the assured on receipt of advice; as to what is due notice, see *Mentz, Decker & Co.* v. *Maritime Insurance Co.* (1909), 15 Com. Cas. 17.

(*d*) For a very extensive licence in a bill of lading, see *Hadji Ali Akbar* v. *Anglo-Arabian and Persian Steamship Co.* (1906), 11 Com. Cas. 219.

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 6.

(*f*) *Bottomley* v. *Bovill* (1826), 5 B. & C. 210.

(*g*) See *Metcalfe* v. *Parry* (1814), 4 Camp. 123; *Pratt* v. *Ashley* (1847), 1 Exch. 257, Ex. Ch.; *Bragg* v. *Anderson* (1812), 4 Taunt. 229; *Lambert* v. *Liddard* (1814), 5 Taunt. 480; *Violett* v. *Allnutt* (1811), 3 Taunt. 419; *Barclay* v. *Stirling* (1816), 5 M. & S. 6; *Rucker* v. *Allnutt* (1812), 15 East, 278; *Andrews* v. *Mellish* (1814), 5 Taunt. 496, Ex. Ch.; *Armet* v. *Innes* (1820), 4 Moore (C. P.), 150; *Hunter* v. *Leathley* (1830), 10 B. & C. 858; (1831), 7 Bing. 517, Ex. Ch.; and see *Warre* v. *Miller* (1825), 4 B. & C. 538.

(*h*) *Lavabre* v. *Wilson* (1779), 1 Doug. (K. B.) 284, 286; *Hogg* v. *Horner* (1797), 2 Park on Marine Insurance, 8th ed., p. 626; *Ranken* v. *Reeve* (1814), 2 Park on Marine Insurance, 8th ed., p. 627; *Gairdner* v. *Senhouse* (1810), 3 Taunt. 16 (distinguished in *Bragg* v. *Anderson*, *supra*; *Andrews* v. *Mellish*, *supra*; *Williams* v. *Shee* (1813), 3 Camp. 469; *Bottomley* v. *Bovill*, *supra*; *Hamilton* v. *Sheddon* (1837), 3 M. & W. 49; *S.S. Kynance Co., Ltd.* v. *Young* (1911), 104 L. T. 397.

(*i*) *Langhorn* v. *Allnutt* (1812), 4 Taunt. 511; *Hammond* v. *Reid* (1820), 4 B. & Ald. 72; *Solly* v. *Whitmore* (1821), 5 B. & Ald. 45; *Laing* v. *Union Marine Insurance Co.*, *Laing* v. *London Assurance Corporation* (1895), 1 Com. Cas. 11; compare *Violett* v. *Allnutt*, *supra*; *Leduc* v. *Ward* (1888), 20 Q. B. D. 475, 482, C. A.; *Glynn* v. *Margetson & Co.*, [1893] A. C. 351 (bill of lading cases).

the trading, breaking bulk, landing or loading cargo be completed during the period of the ship's lawful stay in such port without additional delay or substantial variation of the risk (*j*).

(5) If, however, such trading gives rise to delay that would not otherwise have been incurred, it may, for the reason (*k*) mentioned below, afford a defence to the underwriter (*l*).

Where the policy specifically describes the course which the ship is to take between the two termini, such course must be strictly followed, and if the policy names one intermediate port at which the ship may touch, this may bind her not to touch at any other intermediate port, on the principle *expressio unius est exclusio alterius* (*m*).

Order in which ship must proceed to ports.

782. Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation (*n*).

Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation (*o*).

Implied condition that voyage should be prosecuted with reasonable dispatch.

783. Over and above the conditions in a voyage policy that there shall be no deviation or abandonment of the voyage, there is a condition that the adventure insured shall be prosecuted throughout its course with reasonable dispatch, and if without lawful excuse it is not so prosecuted, the insurer is discharged from the time when the delay became unreasonable (*p*). Whenever the delay exceeds

(*j*) *Urquhart* v. *Barnard* (1809), 1 Taunt. 450; *Laroche* v. *Oswin* (1810), 12 East, 131; *Raine* v. *Bell* (1808), 9 East, 195; *Cormack* v. *Gladstone* (1809), 11 East, 347; *Warre* v. *Miller* (1825), 4 B. & C. 538.

(*k*) See the text, *infra*.

(*l*) *African Merchants (Company)* v. *British and Foreign Marine Insurance Co.* (1873), L. R. 8 Exch. 154.

After a very able and elaborate discussion of the cases cited in notes (*g*), (*h*), (*i*), p. 398, *ante*, and notes (*j*), (*l*), *supra*, the editors of Arnould on Marine Insurance, in s. 411, correctly state that the five principles mentioned in the text may be deduced from them.

(*m*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 46 (2) (a); *Elliot* v. *Wilson* (1776), 4 Bro. Parl. Cas. 470.

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 47 (1); *Beatson* v. *Haworth* (1796), 6 Term Rep. 531; *Marsden* v. *Reid* (1803), 3 East, 572, 577. A ship insured to several ports need not visit them all, but if she goes to more than one she must take them in the order named in the policy (*ibid.*). As to cases where a ship is insured "at and from" some one named port of departure, and "other port or ports," see *Bragg* v. *Anderson* (1812), 4 Taunt. 229; *Lambert* v. *Liddard* (1814), 5 Taunt. 480; *Pratt* v. *Ashley* (1847), 1 Exch. 257, Ex. Ch.; compare *Brown* v. *Tayleur* (1835), 4 Ad. & El. 241.

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 47 (2); *Clason* v. *Simmonds* (1742), 6 Term Rep. 533; *Andrews* v. *Mellish* (1841), 5 Taunt. 496, 502, Ex. Ch.; distinguish *S.S. Kynance Co., Ltd.* v. *Young* (1911), 104 L. T. 397; and see p. 391, *ante*.

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 48. This section does not state whether or not there may be lawful excuses other than those mentioned

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a reasonable time either at the *terminus a quo* or during the voyage, or at the *terminus ad quem*, or is incurred for purposes unconnected with the object of the voyage, the insurance ceases to be in force (*q*).

Causes excusing deviation and delay.

784. There are, however, causes which excuse a deviation or delay. The following causes are enumerated in the Act (*r*):—

What will excuse deviation or delay.

Deviation or delay in prosecuting the voyage contemplated by the policy is excused:—

(A) Where authorised by any special term in the policy; or

(B) Where caused by circumstances beyond the control of the master and his employer; or

(C) Where reasonably necessary in order to comply with an express or implied warranty; or

(D) Where reasonably necessary for the safety of the ship or subject-matter insured; or

(E) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(F) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(G) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against (*r*).

Terms of policy must not be exceeded.

As regards (A)—The deviation or delay must not exceed what is permitted by the special terms in the policy, and the permission cannot be extended to objects not mentioned in the policy, for the maxim *expressio unius est exclusio alterius* generally applies (*s*).

in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 49; it may therefore still be necessary to refer to decided cases.

(*q*) *Chitty* v. *Selwyn* (1742), 2 Atk. 359; *Hartley* v. *Buggin* (1781), 2 Park on Marine Insurance, 8th ed., p. 652; *Grant* v. *King* (1802), 4 Esp. 175; *Samuel* v. *Royal Exchange Assurance Co.* (1828), 8 B. & C. 119; *Mount* v. *Larkins* (1831), 8 Bing. 108; *Doyle* v. *Powell* (1832), 4 B. & Ad. 267; *Hamilton* v. *Sheddon* (1837), 3 M. & W. 49; compare *Pearson* v. *Commercial Union Assurance Co.* (1876), 1 App. Cas. 498, 504. What is a reasonable time is a question of fact (see Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 88; *Bain* v. *Case* (1829), 3 C. & P. 496). *Phillips* v. *Irving* (1844), 7 Man. & G. 325, a leading case on the subject, lays down the principle that whether the delay at the port where the ship happens to be, be reasonable or not must be determined, not by any arbitrary rule, but by the state of things existing at that port. The same principle was acted upon by Lord ELLENBOROUGH, C.J., in *Grant* v. *King*, *supra*. As to whether carrying and cruising under letters of marque constitutes a deviation, see *Moss* v. *Byrom* (1795), 6 Term Rep. 379, 382 (distinguishing and doubting *Denison* v. *Modigliani* (1794), 5 Term Rep. 580); *Parr* v. *Anderson* (1805), 6 East, 202; and as to liberty to chase, capture etc., see *Syers* v. *Bridge* (1780), 2 Doug. (K. B.) 527; *Lawrence* v. *Sydebotham* (1805), 6 East, 45; *Jarratt* v. *Ward* (1808), 1 Camp. 263; *Hibbert* v. *Halliday* (1810), 2 Taunt. 428.

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 49 (1). It seems somewhat doubtful whether this section of the Act was intended to enumerate all the causes which will excuse deviation or delay. Of course, if the ship insured under a voyage policy is unseaworthy at the time she sails because she is not sufficiently manned, equipped, or furnished with supplies, the underwriters will be discharged from liability whether or not there be deviation, and the question of excuse cannot arise; see *Woolf* v. *Claggett* (1800), 3 Esp. 257; *O'Reilly* v. *Royal Exchange Assurance* (1815), 4 Camp. 246.

(*s*) *Doyle* v. *Powell*, *supra*; *Elliot* v. *Wilson* (1776), 4 Bro. Parl. Cas. 470; *Syers* v. *Bridge*, *supra*; *Parr* v. *Anderson*, *supra*. The usual deviation clause, according to which the subject-matter insured shall be covered on payment of

As regards (B)—Only a voluntary departure from the course of the insured voyage discharges the underwriter from further liability. Thus, if the master is obliged to go into a port of distress in order to repair his ship, or is compelled by the perils of the sea or by the violence of a mutinous crew to go out of the usual course, or where a ship is forcibly detained by a cruiser or is prevented by an embargo from landing, this deviation or delay is excused (*t*). Only voluntary departure discharges underwriter.

As regards (C)—This excuse is applicable where a ship is delayed in port for repairs necessary to make her seaworthy for the voyage, or where she is delayed at an intermediate port to make her seaworthy for the next stage of the voyage (*u*). Necessary repairs.

As regards (D)—This excuse seems limited, except where the safety of the ship is involved, to the case of a deviation or delay rendered necessary for the safety of the particular subject-matter insured, with the result that in the case of an insurance on cargo, freight, or other interest, deviation for the purpose of saving the ship would be excused (*w*); but that in the case of an insurance on ship, deviation merely for the purpose of saving cargo or freight would not be excused. On the other hand, it is not limited to the necessity of saving the ship, or the subject-matter insured, from some peril insured against (*x*). Safety of subject-matter.

As regards (E)—The liberty given by this excuse does not extend to the case of deviation made solely for the purpose of saving property (*y*). Safety of human life.

As regards (G)—Deviation caused by barratry may be excused (*z*), but deviation is not excused by the ignorance or want of skill of the master, however gross it may be (*a*). Barratry.

an additional premium, is, of course, a special term in the policy within the meaning of excuse (A) (see p. 400, *ante*).

(*t*) *Harrington* v. *Halkeld* (1778), 2 Park on Marine Insurance, 8th ed., p. 639; *Driscol* v. *Bovil* (1798), 1 Bos. & P. 313; *Woolf* v. *Claggett* (1800), 3 Esp. 257; *Grant* v. *King* (1802), 4 Esp. 175; *Scott* v. *Thompson* (1805), 1 Bos. & P. (N. R.) 181; *Phelps* v. *Auldjo* (1810), 2 Camp. 350; *Schroder* v. *Thompson* (1817), 7 Taunt. 462.

(*u*) *Motteux* v. *London Assurance Co.* (1739), 1 Atk. 545, 546; *Smith* v. *Surridge* (1801), 4 Esp. 25; *Bouillon* v. *Lupton* (1863), 15 C. B. (N. S.) 113; and see *Phillips* v. *Irving* (1844), 7 Man. & G. 325.

(*w*) It is also an excuse as between shipowner and cargo-owner (*The "Teutonia"* (1872), L. R. 4 P. C. 171; *Anderson* v. *The "San Roman"* (*Owners*), *The "San Roman"* (1873), L. R. 5 P. C. 301). There seems good reason why, as between shipowners and charterers, a deviation for the purpose of saving cargo should be excused, though it would not be as between shipowner and underwriter on ship.

(*x*) In this respect the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), effects a change in the law as laid down in *O'Reilly* v. *Royal Exchange Assurance* (1815), 4 Camp. 246; but there the ship was unseaworthy when she sailed. As to what are the elements of reasonable necessity, see *Phelps, James & Co.* v. *Hill*, [1891] 1 Q. B. 605, 612, C. A. (a bill of lading case); *The "Teutonia,"* *supra*, and *Anderson* v. *The "San Roman"* (*Owners*), *The "San Roman,"* *supra* (apprehension of capture).

(*y*) *Scaramanga* v. *Stamp* (1880), 5 C. P. D. 295, C. A.

(*z*) *Phyn* v. *Royal Exchange Assurance Co.* (1798), 7 Term Rep. 505; *Tait* v. *Levi* (1811), 14 East, 481.

(*a*) *Vallejo* v. *Wheeler* (1774), 1 Cowp. 143; *Ross* v. *Hunter* (1790), 4 Term Rep. 33.

SECT. 10. Commencement, Duration, and Area of Risk.

Resumption of course.

The Act (*b*) further provides that when the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable dispatch (*b*). This evidently does not mean that the ship must return to the actual spot where she turned aside, but that she must make the best of her way to the *terminus ad quem* of the voyage (*c*).

SECT. 11.—*Avoidance of Policies and Warranties.*

SUB-SECT. 1.—*Alteration and Rectification of Policy.*

(i.) *Alteration.*

When a policy is avoided by alteration.

785. A policy of insurance, like any other contract, may be altered by consent, even after it is underwritten, provided the alteration is in writing signed or initialled by the underwriter (*d*), and is not inconsistent with the provisions of the Stamp Act, 1891 (*e*). But no alteration by one underwriter can bind any of the other underwriters, and any material alteration of the policy, when in the possession of the assured or his agent, avoids the policy, except as to the underwriters who had consented to it by signing or initialling the alteration (*f*). On the other hand, an alteration, if not material, will not vitiate the policy, the only result being that, if some of the underwriters have consented to the alteration after the policy is executed and others refuse, those who consent make the altered instrument their own, and those who do not consent remain liable on their original contract (*g*).

What is a material alteration.

What is immaterial.

786. An alteration is material which in any degree affects the contract or any rights or remedies under it, as, for instance, where the destination of the vessel insured is altered at the time of her sailing or the subject of the insurance is altered (*h*), but an alteration or addition is not material which merely expresses what the law could otherwise imply as to the effect or construction of the instrument (*i*).

Effect of Stamp Act, 1891.

787. Although the underwriter may have assented to the alteration of the policy, the altered policy will have no legal validity without a fresh stamp, unless the alteration comply with the conditions specified in the Stamp Act, 1891 (*j*), namely, that the alteration

(*b*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 49 (2).

(*c*) *Harrington* v. *Halkeld* (1778), 2 Park on Marine Insurance, 8th ed., p. 639; *Delany* v. *Stoddart* (1785), 1 Term Rep. 22.

(*d*) *Kaines* v. *Knightly* (1682), Skin. 54; *Robinson* v. *Tobin* (1816), 1 Stark. 336.

(*e*) 54 & 55 Vict. c. 39, s. 96; see the text, *infra*. The Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 91 (2), saves the rules of the common law, including the law merchant, so far as they are not inconsistent with the express provisions of the Act. As to the general law relating to alterations of contracts, see title CONTRACT, Vol. VII., pp. 424 *et seq.*

(*f*) *Laird* v *Robertson* (1791), 4 Bro. Parl. Cas. 488; *Langhorn* v. *Cologan* (1812), 4 Taunt. 330; *Campbell* v. *Christie* (1817), 2 Stark. 64; *Fairlie* v. *Christie* (1817), 7 Taunt. 416; *Forshaw* v. *Chabert* (1821), 3 Brod. & Bing. 158.

(*g*) *Sanderson* v. *Symonds* (1819), 1 Brod. & Bing. 426; *Sanderson* v. *M'Cullom* (1819), 4 Moore (C. P.), 5; *Forshaw* v. *Chabert, supra*, at p. 165.

(*h*) *Laird* v. *Robertson, supra; Langhorn* v. *Cologan, supra; Fairlie* v. *Christie, supra; Campbell* v. *Christie, supra; Forshaw* v. *Chabert, supra.*

(*i*) *Clapham* v. *Cologan* (1813), 3 Camp. 382, and cases cited in note (*g*), *supra.*

(*j*) 54 & 55 Vict. c. 39.

be made before notice of the determination of the risk originally insured; that it do not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months; that the articles insured remain the property of the same person or persons; and that no additional or further sum be insured by reason or means of the alteration (*k*).

The words "before notice of the determination of the risk originally insured" refer to a determination of the risk caused by the loss or safe arrival of the subject-matter insured, or by the final conclusion of the insured voyage, and therefore do not comprise a determination of the risk caused by a breach of warranty (*l*). Moreover, the clause speaks of the actual determination of the risk, therefore a mere intention to determine the risk at the time the policy is altered is immaterial (*m*).

The provision that the articles insured must "remain the property of the same persons" in effect implies that there must be one identical and continued subject-matter of insurance (*n*). But an alteration which merely corrects a mistake in the description of the subject-matter made in drawing up the policy does not require to be restamped (*o*). An express or implied warranty may be altered without requiring the policy to be restamped (*p*) Where the altered policy is invalid by reason of not being restamped it has been held that the original policy cannot be enforced (*q*).

(ii.) *Rectification.*

Rectification of policies.

788. When a mistake has been made in drawing up a contract, and its terms do not correctly express the real agreement between the parties, the court will generally rectify the instrument so as to make it correspond with the true intention of the parties (*r*). The

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 96. This provision is very similar to stat. (1795), 35 Geo. 3, c. 63, s. 13, and will, like it, receive a liberal construction (*Brocklebank* v. *Sugrue* (1830), 1 B. & Ad. 81, *per* Lord TENTERDEN, C.J., at p. 88).

(*l*) *Kensington* v. *Inglis* (1807), 8 East, 273, 291, Ex. Ch.; *Hubbard* v. *Jackson* (1811), 4 Taunt. 169; *Ridsdale* v. *Shedden* (1814), 4 Camp. 107.

(*m*) *Ramstrom* v. *Bell* (1816), 5 M. & S. 267; *Brocklebank* v. *Sugrue, supra.*

(*n*) *Hill* v. *Patten* (1807), 8 East, 373; *Kensington* v. *Inglis, supra*, at p. 292; *Hubbard* v. *Jackson, supra.*

(*o*) *Sawtell* v. *Loudon* (1814), 5 Taunt. 359; *Robinson* v. *Touray* (1811), 3 Camp. 158; (1813) 1 M. & S. 217 (mistake in declaration of interest); and see *Cole* v. *Parkin* (1810), 12 East, 471 (mistake in bill of sale of ship).

(*p*) *Hubbard* v. *Jackson, supra* (express); *Weir* v. *Aberdeen* (1819), 2 B. & Ald. 320 (implied).

(*q*) *Reed* v. *Deere* (1827), 7 B. & C. 261; *French* v. *Patten* (1807), 1 Camp. 72; *French* v. *Patton* (1808), 9 East, 351; *Forshaw* v. *Chabert* (1821), 3 Brod. & Bing. 158. 1 Duer, Law of Marine Insurance, p. 87, doubts the correctness of these decisions, and the grounds on which they are based seem inconsistent with those enunciated in *Ogle* v. *Vane* (*Earl*) (1868), L. R. 3 Q. B. 272, Ex. Ch. That case did not, however, involve any question relating to the Stamp Acts or any other Act relating to revenue.

(*r*) *Motteux* v. *London Assurance Co.* (1739), 1 Atk. 545; *Henkle* v. *Royal Exchange Assurance Co.* (1749), 1 Ves. Sen. 317. See also titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 360; MISTAKE.

SECT. 11. Avoidance of Policies and Warranties.

Marine Insurance Act, 1906 (*s*), provides that "where there is a duly stamped policy reference may be made as heretofore to the slip or covering note in any legal proceeding," and it seems that, notwithstanding the provisions of the Stamp Act, 1891 (*t*), the court has power to rectify a duly stamped policy so as to make it correspond with the terms expressed in the slip or covering note (*u*).

SUB-SECT. 2.—*Avoidance of Policy by Fraud or Concealment.*

(i.) *Fraud.*

Contract voidable on the ground of fraud.

789. A contract of marine insurance, like any other contract, is voidable on the ground of fraud, and any fraudulent misrepresentation made in order to induce the underwriter to enter into the contract entitles him to avoid the policy, unless it is proved, either that he knew the true state of facts at the time of contracting, or that he did not rely on the misrepresentation (*v*). Independently, however, of fraud, a misrepresentation as to material facts, or a non-disclosure of material facts, may discharge the underwriter from liability (*w*).

(ii.) *Concealment or Non-disclosure.*

The contract of insurance is a contract *uberrimæ fidei.*

790. It is a fundamental principle that a contract of marine insurance is a contract *uberrimæ fidei*, that is, a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party (*x*). Thus, if when the contract is concluded (*y*), the assured knew of the loss of the property insured, the underwriter may avoid the contract, and similarly if at that time the underwriter knew that the insured ship had safely arrived at her

(*s*) 6 Edw. 7, c. 41, s. 89.

(*t*) 54 & 55 Vict. c. 39, ss. 93—96; see p. 338, *ante*.

(*u*) In *Mackenzie* v. *Coulson* (1869), L. R. 8 Eq. 368, JAMES, V.-C., dismissed a bill for rectification on the ground that there can be no rectification unless there has been an actual concluded contract entered into before the date of the instrument which it is sought to rectify, and that the slip did not constitute a contract; this decision, however, was previous to the Stamp Act, 1891 (54 & 55 Vict. c. 39), and in subsequent cases it has not been disputed that there is power to rectify a policy which is not in accordance with the slip. See *The Aikshaw* (1893), 9 T. L. R. 605; *Spalding* v. *Crocker* (1897), 2 Com. Cas. 189; *Allom* v. *Property Insurance Co.* (1911), *Times*, Commercial Supplement, 10th February (fire).

(*v*) *Smith* v. *Chadwick* (1882), 20 Ch. D. 27, *per* JESSEL, M.R., at p. 44; (1884) 9 App. Cas. 187, *per* Lord SELBORNE, L.C. at p. 190; *Arnison* v. *Smith* (1889), 41 Ch. D. 348, C. A., *per* Lord HALSBURY, L.C., at pp. 368, 369. As to the effect of fraud in vitiating a contract, see title MISREPRESENTATION AND FRAUD.

(*w*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 18, 20; and see pp. 405 *et seq.*, *post*.

(*x*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 17. In every contract of marine insurance there is an implied condition that there is no misrepresentation or concealment (*Blackburn* v. *Vigors* (1886), 17 Q. B. D. 553, C. A., *per* Lord ESHER, M.R., at p. 561 (approving Phillips, Law of Insurance, s. 537); affirmed (1887), 12 App. Cas. 531; see *per* Lord WATSON, *ibid.*, at p. 539). Compare title GUARANTEE, Vol. XV., p. 539.

(*y*) *I.e.*, when the assured's proposal is accepted (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 21).

destination, the assured may avoid the contract and receive back the premium (*a*).

Provisions of the Marine Insurance Act, 1906, as to disclosures and representation.

791. (1) Subject to the following provisions (*b*), the assured must disclose to the insured, before the contract is concluded (*c*), every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract (*d*).

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk (*e*).

What need not be disclosed.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely :—(i.) Any circumstance which diminishes the risk ; (ii.) Any circumstance which is known or presumed to be known to the insurer : the insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know ; (iii.) Any circumstance as to which information is waived by the insurer ; (iv.) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty (*f*).

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact (*g*).

(5) The term "circumstance" includes any communication made to, or information received by, the assured (*h*).

Duty of agent.

Subject to the above provisions as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him ; and

(b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent (*i*).

Construction of the Marine Insurance Act, 1906, s. 18.

792. The above provision (1) must be read in connection with the preceding clause (b). The result is that where the assured

(*a*) *Carter* v. *Boehm* (1766), 3 Burr. 1905, *per* Lord MANSFIELD, C.J., at p. 1909.

(*b*) *I.e.*, Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (3) ; see the text, *infra*.

(*c*) A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not ; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped (*ibid.*, s. 21 ; and see p. 348, *ante*).

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (1).

(*e*) *Ibid.*, s. 18 (2).

(*f*) *Ibid.*, s. 18 (3).

(*g*) *Ibid.*, s. 18 (4) ; *Gunford Ship Co., Ltd.* v. *Thames and Mersey Marine Insurance Co., Ltd.*, [1910] S. C. 1072.

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (5).

(*i*) *Ibid.*, s. 19.

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effects a policy through an agent, the underwriter cannot avoid the contract if the assured, as soon as he is aware of a material circumstance, *bonâ fide* and with all reasonable dispatch communicates it to the agent, although the latter receives the information too late to apprise the underwriter before the contract is concluded.

Time when contract concluded is the critical time.

793. A concealment of a fact known to the assured, or a misrepresentation made by him, after the conclusion of the contract does not entitle the underwriter to avoid the contract (*j*).

When election must be made to avoid the contract.

794. Where the contract is voidable on the ground of misrepresentation or concealment on the part of the assured, it may be important, in certain circumstances, for the latter to know whether the underwriter elects to disaffirm it, in order that the assured may be able to take steps to effect another insurance. The fact that the underwriter has subscribed a policy without protest does not, however, prove that he has elected to affirm the contract, inasmuch as he may have acted in pursuance of the usage which binds the underwriter to subscribe a policy in accordance with the slip; and it is still an undecided question whether the underwriter must make his election in a reasonable time, or whether he is at liberty to repudiate the contract at any time, unless in the meantime the rights of third parties have intervened, or the assured has altered his position under the belief that the contract was a subsisting one. As a general rule, contracts which are voidable may be avoided at any time, unless the rights of third parties have intervened or unless the other party to the contract has been reasonably led to believe that the contract was subsisting and binding; and, as the Act is silent on this subject, it is submitted that the same rule governs contracts of marine insurance (*k*).

(*j*) *Cory* v. *Patton* (1872), L. R. 7 Q. B. 304; *Lishman* v. *Northern Maritime Insurance Co.* (1875), L. R. 10 C. P. 179, Ex. Ch.: and see *Ionides* v. *Pacific Insurance Co.* (1871), L. R. 6 Q. B. 674; affirmed (1872), L. R. 7 Q. B. 517, Ex. Ch. The fact that the contract was concluded by the slip being initialled subject to ratificaion by the assured, and that the matter concealed came to his knowledge before the issue of the policy, makes no difference (*Cory* v. *Patton* (1874), L. R. 9 Q. B. 577, following *Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485). This accords with the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 86. But where a broker is instructed to effect a policy on goods, and by mistake effects one on the ship, and the underwriter afterwards agrees to a rectification of the policy, the broker is bound to disclose a material fact which has come to his knowledge between the execution of the policy and its rectification, for the underwriter is under no obligation to make the alteration, and by doing so he is really making a new and distinct insurance (*Sawtell* v. *Loudon* (1814), 5 Taunt. 359). If, on the other hand, the policy does not correspond with the slip to which the underwriter has assented, so that it is his duty to correct the error, the alteration does not make a new contract, but merely declares the true meaning of that already concluded, and there is no necessity to disclose the information acquired after the making of the contract (2 Duer, Law of Marine Insurance, p. 428).

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 91 (2); *Clough* v. *London and North-Western Rail. Co.* (1871), L. R. 7 Exch. 26, Ex. Ch.; *Morrison* v. *Universal Marine Insurance Co.* (1873), L. R. 8 Exch. 197, Ex. Ch.

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Assured is deemed to know every circumstance which in the ordinary course of business ought to be known to him.

795. The insurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge (*l*), and that the latter will take the necessary measures by the employment of competent and honest agents to obtain through the ordinary channels of intelligence in use in the mercantile world all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of an agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it (*m*).

The master of a ship and the general agent of a shipowner, for the transaction of his shipping business, are agents whose knowledge will be imputed to the shipowner (*n*); and similarly, a factor employed to ship a cargo and forward the shipping documents, and the general representative of the assured at a foreign port, are agents with whose knowledge the owner of cargo is affected (*o*)

Knowledge of agent effecting insurance.

796. Sometimes an agent employed to effect an insurance, instead of dealing direct with the underwriter, acts through an intermediate agent or agents, and in such cases the concealment of a material fact within the knowledge of any agent through whose agency, whether mediately or directly, the insurance has been effected, vitiates the policy (*p*).

But where a broker who is employed to obtain an insurance on a particular risk fails in so doing, and it is afterwards effected by another broker, the policy is not avoided by the non-disclosure of facts which were unknown to the principal and the second broker, though they were within the knowledge of the first, for the knowledge of the latter cannot be imputed to the principal (*q*).

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (1). "The material facts are as to the subject matter, the ship and perils to which the ship is exposed." The name of the assured need not be disclosed unless asked for (*Glasgow Assurance Corporation* v. *Symondson & Co.* (1911), 104 L. T. 254, *per* SCRUTTON, J., at p. 257).

(*m*) *Proudfoot* v. *Montefiore* (1867), L. R. 2 Q. B. 511, 521; *Blackburn, Low & Co.* v. *Vigors* (1887), 12 App. Cas. 531, 540, 542. See also title GUARANTEE, Vol. XV., p. 539.

(*n*) *Gladstone* v. *King* (1813), 1 M. & S. 35; *Blackburn, Low & Co.* v. *Vigors*, *supra*, *per* Lord HALSBURY, L.C., at p. 537; *per* Lord WATSON, at p. 540.

(*o*) *Fitzherbert* v. *Mather* (1785), 1 Term Rep. 12; *Proudfoot* v. *Montefiore*, *supra*. As to the knowledge of a clerk of the assured being equivalent to that of the assured, see *Stewart* v. *Dunlop* (1785), 1 Park on Marine Insurance, 8th ed., p. 446, H. L. It has already been seen (see note (*i*), p. 339, *ante*), that Lloyd's agents are not the agents of the underwriters at Lloyd's (*Wilson* v. *Salamandra Assurance Co. of St. Petersburg* (1903), 8 Com. Cas. 129).

(*p*) *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144; see also *Lynch* v. *Dunsford* (1811), 14 East, 494, Ex. Ch.; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 19; and see *Thames and Mersey Marine Insurance Co., Ltd.* v. *Gunford Ship Co., Ltd., Southern Marine Mutual Insurance Association* v. *Gunford Ship Co., Ltd.* (1911), *Times*, 29th June, H. L. (over-insurance by agent by means of honour policies).

(*q*) *Blackburn, Low & Co.* v. *Vigors*, *supra*. In *Gladstone* v. *King*, *supra*, and *Stribley* v. *Imperial Marine Insurance Co.* (1876), 1 Q. B. D. 507, it was decided that when an agent whose duty it is to keep his principal

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797. The assured is bound to disclose not only facts which are material to the risks considered in their own nature and which have a direct bearing on the extent of those risks, but also all circumstances which would influence the mind of a prudent underwriter in accepting the insurance or fixing the premium (*r*). Thus, the non-disclosure of the fact that the property insured is excessively over-valued in the policy may be a ground for avoiding it (*s*).

As to the materiality of the circumstances.

The materiality of any particular circumstance is in no way determined or affected by events subsequent to the conclusion of the contract, and the insurance is therefore voidable although the intelligence concealed turns out to be altogether untrue, or the loss to have arisen from a cause wholly different from and wholly unconnected with that referred to in the intelligence or with any of the matters therein comprised. The only question is whether the circumstances or information concealed, whether by design or mistake, were such as would have influenced the mind of a prudent underwriter. Thus if, in proposing an insurance on goods on board a certain ship, the assured, having received information that the ship has met with an accident, fails to communicate the intelligence to the underwriter, the latter will be discharged from liability, although the omission is due to mere mistake or carelessness, and although the information turns out in fact to have been wholly untrue, and even although the goods are lost by capture wholly unconnected with the perils of the seas (*t*).

The time of ship's sailing or being last heard of.

798. The time of the ship's sailing or her being last heard of are facts as to which the assured may be bound to disclose his knowledge or information. Such disclosure is certainly necessary when it would lead to the inference that the ship is a missing or overdue vessel; and it may also be necessary in other cases where circumstances known to the assured exist which make those times material. The question in all cases is a question of fact (*u*), namely, whether the circumstances known to the assured, or as to which

informed omits without fraud to inform him of an occurrence causing an average loss, and thereby prevents the principal from disclosing the occurrence, the insurance is not entirely avoided, and the only consequence is that the underwriter is not liable for the average loss. These decisions, the principle of which it is not easy to understand, were disapproved of by Lord HALSBURY, L.C., and Lord WATSON in *Blackburn, Low & Co.* v. *Vigors* (1887), 12 App. Cas. 531, and there is little doubt that they are overruled by the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (1) (see p. 405, *ante*). In other respects the effect of the cases cited here, and in notes (*m*) to (*p*), p. 407, *ante*, is briefly summarised in a single sentence of that clause.

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (1), (2).

(*s*) *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531; *Rivaz* v. *Gerussi* (1880), 6 Q. B. D. 222, C. A.; *Herring* v. *Janson* (1895), 1 Com. Cas. 177; *Thames and Mersey Marine Insurance Co., Ltd.* v. *Gunford Ship Co., Ltd.*, *Southern Marine Mutual Insurance Association* v. *Gunford Ship Co., Ltd.* (1911), *Times*, 29th June, H. L. (over-valuation and over-insurance: some of the policies by which over-insurance was effected were honour policies).

(*t*) *Lynch* v. *Hamilton* (1810), 3 Taunt. 37, 44; affirmed, *sub nom. Lynch* v. *Dunsford* (1811), 14 East, 494, Ex. Ch.; *De Costa* v. *Scandret* (1723), 2 P. Wms. 170; *Seaman* v. *Fonereau* (1743), 2 Stra. 1183; *Nicholson* v. *Power* (1869), 20 L. T. 580; *Morrison* v. *Universal Marine Insurance Co.* (1872), L. R. 8 Exch. 40; reversed on other points (1873), L. R. 8 Exch. 197, Ex. Ch.; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (4), (5).

(*u*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (4).

he has information, the time of a ship's sailing or when she was last heard of, would influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk (*x*).

Disclosure necessary though the policy covers all losses.

799. It is important to observe that although the policy may by its express terms cover losses by all perils of the seas, this does not relieve the assured from the obligation to disclose information he has received as to the insured vessel having encountered severe weather. Similarly, if a policy is on goods on board a certain vessel "at and from port or ports of loading in the province of Buenos Ayres," and the assured is apprised that the ship was intended to load at a roadstead then unknown to underwriters as a place of loading, the underwriter will be discharged if the assured does not communicate the place of loading (*a*). For a like reason, if a ship is to be employed on a service of peculiar danger, and this cannot be inferred from the terms of the policy, the fact ought to be communicated to the underwriter. Again, where goods are insured "on ships and ships" (*b*), and the assured knows that the goods are loaded on board a vessel which was reported in Lloyd's list as having met with an accident, the underwriter will be discharged from liability if the assured has not disclosed to him the name of the ship (*c*). So, also, if the assured has entered into a contract which makes the measure of ultimate loss to the underwriter greater than what is usual (for instance, by reason of his right of subrogation being injuriously affected), and he does not disclose the fact, this may amount to concealment of a material fact and may vitiate the policy (*d*).

(*x*) The following are the principal cases relating to this subject, although they are of but little use, not only because the question is one of fact depending on the particular circumstances of each case, but also because the changes in the course and mode of navigation, and the facilities of communication by way of telegraph or otherwise, are such as to prevent the earlier cases from being a safe guide as to such inferences of fact:—*Freeland* v. *Glover* (1806), 7 East, 457; *Elton* v. *Larkins* (1832), 8 Bing. 198; S. C., on second trial, 5 C. & P. 385; *Stribley* v. *Imperial Marine Insurance Co.* (1876), 1 Q. B. D. 507; *Ratcliffe* v. *Shoolbred* (1780), 1 Park on Marine Insurance, 8th ed., p. 413; *M'Andrew* v. *Bell* (1795), 1 Esp. 373; *Webster* v. *Foster* (1795), 1 Esp. 407; *Willes* v. *Glover* (1804), 1 Bos. & P. (N. R.) 14; *Mackintosh* v. *Marshall* (1843), 11 M. & W. 116; *Bridges* v. *Hunter* (1813), 1 M. & S. 15; *Foley* v. *Moline* (1814), 5 Taunt. 430; *Littledale* v. *Dixon* (1805), 1 Bos. & P. (N. R.) 151; *Elkin* v. *Janson* (1845), 13 M. & W. 655; *Rickards* v. *Murdock* (1830), 10 B. & C. 527; *Westbury* v. *Aberdein* (1837), 2 M. & W. 267; *Kirby* v. *Smith* (1818), 1 B. & Ald. 672; *Bell* v. *Bell* (1810), 2 Camp. 475, 479. As to the cases involving the question whether when the old convoy Acts were in force the assured was bound to disclose the fact that the ship sailed or was intended to sail without convoy, see *Sawtell* v. *Loudon* (1814), 5 Taunt. 359; *Long* v. *Duff*, *Long* v. *Bolton* (1800), 2 Bos. & P. 209; *Reid & Co.* v. *Harvey* (1816), 4 Dow, 97, H. L.

(*a*) *Harrower* v. *Hutchinson* (1870), L. R. 5 Q. B. 584, Ex. Ch.; *Laing* v. *Union Marine Insurance Co.*, *Laing* v. *London Assurance Corporation* (1895), 1 Com. Cas. 11.

(*b*) 1 Émérigon, Traité des Assurances, p. 172; compare *Bolivia Republic* v. *Indemnity Mutual Marine Assurance Co.* (1908), 99 L. T. 394, 398.

(*c*) *Lynch* v. *Hamilton* (1810), 3 Taunt. 37; affirmed *sub nom. Lynch* v. *Dunsford* (1811), 14 East, 494, Ex. Ch.; *Leigh* v. *Adams* (1871), 25 L. T. 566.

(*d*) *Tate* v. *Hyslop* (1885), 15 Q. B. D. 368, C. A. This case might also have been decided on the ground that there was a virtual misrepresentation.

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Matters which need not be disclosed.

Circumstances known to underwriter.

800. There are certain circumstances which, in the absence of inquiry, need not be disclosed (*e*). As to these, the following points have to be noticed.

It is obvious that the insurer has no ground of complaint because he is not informed of a circumstance which diminishes the risk or of a circumstance which is known to him (*f*). Moreover, the assured is not bound to disclose any circumstance which may fairly be assumed to be known to the underwriter (*g*). Thus, the assured need not mention general topics of speculation, nor causes which may occasion natural or political perils, such as the difficulty of the voyage, the probability of hurricanes, earthquakes, war, or embargo and the like, nor the trade regulations of Governments (*h*).

Circumstances known to assured only.

On the other hand, if the assured has private information of any trade regulation recently introduced or of any particular danger affecting the risk insured, and which in the ordinary course of business would not be known to the underwriter, the non-disclosure of such information would vitiate the policy (*i*). Nor can the assured excuse his omission to communicate a material fact on the ground that it had previously come to the knowledge of the underwriter, unless at the time when the contract was made the fact was present to the mind of the underwriter (*k*).

Information waived by the underwriter.

801. The assured is not bound to disclose any information which is waived by the insurer (*l*). Speaking generally, where from the facts communicated to the underwriter he would naturally infer the existence of other facts not disclosed, his omission to make inquiry is an implied waiver of a more explicit disclosure. Thus, where an insurance is applied for in time of war on a cruiser "from place to places" without any limitation or description, the underwriters must know from the terms of the proposed insurance that the ship is to be employed in some warlike expedition, and hence, if he omits to inquire, the particular nature of the service in which she is to be employed need not be disclosed to him (*m*).

Information covered by warranty.

802. In the absence of inquiry the assured need not disclose that which is superfluous, as being the subject of any express or

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (3). The enumeration in this clause of excepted circumstances is taken from Lord MANSFIELD'S celebrated judgment in *Carter* v. *Boehm* (1766), 3 Burr. 1905, 1910; 1 Smith, L.C., 11th ed., p. 491.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7. c. 41), s. 18 (3) (a), (b).

(*g*) See *Foley* v. *Tabor* (1861), 2 F. & F. 663, *per* ERLE, C.J., at p. 672.

(*h*) *Carter* v. *Boehm, supra;* and see cases cited in note (*m*) *infra.*

(*i*) *Carter* v. *Boehm, supra,* at p. 1915.

(*k*) *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 595; (distinguished on the facts) *Gandy* v. *Adelaide Insurance Co.* (1871), L. R. 6 Q. B. 746, 755; *Fracis, Times & Co.* v. *Sea Insurance Co.* (1898), 3 Com. Cas. 229 (where a trade prohibition was habitually ignored).

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (c).

(*m*) *Carter* v. *Boehm, supra, per* Lord MANSFIELD, C.J.; *Asfar & Co.* v. *Blundell,* [1896] 1 Q. B. 123, 129, C. A. As illustrations of the same principle, see *Beckwith* v. *Sydebotham* (1807), 1 Camp. 116; *Fort* v. *Lee* (1811), 3 Taunt. 381; *Freeland* v. *Glover* (1806), 7 East, 457. The practice of underwriters as to accepting risks or not making inquiries on particular points cannot affect the statutory duty or be received as evidence of waiver in any particular case (*Thames and Mersey Marine Insurance Co., Ltd.* v. *Gunford Ship Co., Ltd., Southern Marine Mutual Insurance Association* v. *Gunford Ship Co., Ltd.* (1911), *Times,* 29th June, H. L., *per* Lord ALVERSTONE, C.J.).

implied warranty (*n*). Thus, in the case of a voyage policy, the assured need not make any disclosure of information relating to the ship's unseaworthiness when she sailed, because if she did not start on her voyage in a seaworthy condition the underwriter would not be liable (*o*). It is, however, otherwise in the case of a time policy where there is no implied warranty of seaworthiness (*p*)

Further matters which need not be disclosed.

803. The assured is not bound to disclose the estimate formed by other underwriters of the risk or that they have declined it (*q*).

Again, where a fact is a matter of inference and the materials for drawing it are common to both parties, the assured is generally not bound to make any communication on the subject (*r*). It must, however, be always borne in mind that the question whether any particular information which is not disclosed is or is not material, or whether the underwriter has waived the disclosure, are questions of fact, and that therefore the decision in each case must depend upon its particular circumstances. For instance, the payment of a very high premium may be evidence that the underwriter accepted the risk and waived the disclosure of a particular matter (*s*).

As to matters contained in Lloyd's list.

804. As to whether an underwriter who is a member of Lloyd's or a subscriber, and as such receives or has access to Lloyd's daily lists is to be conclusively presumed to have knowledge of their contents, it is now settled that an underwriter cannot reasonably be presumed to carry in his head all that is contained in Lloyd's lists (*t*). Therefore the insurance will be voidable if there has been

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (3) (d). See p. 405, *ante*.

(*o*) *Shoolbred* v. *Nutt* (1782), 1 Park on Marine Insurance, 8th ed., p. 493; *Haywood* v. *Rodgers* (1804), 4 East, 590; *Beckwith* v. *Sydebotham* (1807), 1 Camp. 116; "*Gunford*" *Ship Co., Ltd.* v. *Thames and Mersey Marine Insurance Co., Ltd.*, [1910] S. C. 1072; reversed but not on this point (1911), *Times*, 29th June, H. L. (qualification of master; it was held that neither his name nor his previous history were in ordinary circumstances, or in the circumstances of that case, material to be disclosed). Similarly the insured is generally not bound to make any disclosure as to the condition in which perishable goods were loaded, because, though there is no warranty, he cannot recover any loss occasioned by that condition (*Boyd* v. *Dubois* (1811), 3 Camp. 133). For the definition of voyage policy, see p. 336, *ante*.

(*p*) *Russell* v. *Thornton* (1859), 4 H. & N. 788. For the definition of the time policy, see p. 336, *ante*.

(*q*) *Lebon & Co.* v. *Straits Insurance Co.* (1894), 10 T. L. R. 517, C. A. It was held by Lord ELLENBOROUGH, C.J., in *Bell* v. *Bell* (1810), 2 Camp. 475, 479, that the assured need not communicate the apprehensions or opinions of foreign correspondents, and that it is enough for him to state the facts on which these are founded.

(*r*) *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 595, *per* COCKBURN, C.J., at p. 605; *Gandy* v. *Adelaide Insurance Co.* (1871), L. R. 6 Q. B. 746.

(*s*) *Court* v. *Martineau* (1782), 3 Doug. (K. B.) 161.

(*t*) *Morrison* v. *Universal Marine Insurance Co.* (1872), L. R. 8 Exch. 40, *per* BRAMWELL, B., at p. 54; reversed on grounds not affecting this question (1873), *ibid.*, 197, Ex. Ch.; *Elton* v. *Larkins* (1832), 8 Bing. 198; S. C., on second trial (1832), 5 C. & P. 385; *Nicholson* v. *Power* (1869), 20 L. T. 580, *per* COCKBURN, C.J.; *Mackintosh* v. *Marshall* (1843), 11 M. & W. 116. *Friere* v. *Woodhouse* (1817), Holt (N. P.), 572, a decision contrary to what is stated in the text, can, it seems, be no longer relied on as authority; see also *Lynch* v. *Dunsford* (1811), 14 East, 494, Ex. Ch.; *Foley* v. *Tabor* (1861), 2 F. & F. 662, *per* ERLE, C.J., at p. 672; *Gandy* v. *Adelaide Insurance Co.*, *supra*, at p. 754 (where the underwriter did refer to the register, but failed to draw the correct inference).

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concealment of a material circumstance from the underwriter, although it be recorded in Lloyd's lists, if in fact he is proved not to have been aware of it at the time of concluding the contract. This rule applies also to the case where there has been any false representation made to the underwriter as to the nature of the risk and he acted solely in the reliance of the representation without in fact consulting Lloyd's lists (*a*).

Evidence of underwriters and insurance brokers as to materiality.

805. Although it was once doubtful whether the evidence of underwriters and insurance brokers was admissible to prove the materiality of the representation made, or of the circumstances concealed (*b*), it has now become the established practice to admit such evidence (*c*).

Underwriter presumed to know the usage of trade.

806. The assured is entitled to assume that the underwriter is acquainted with the general usage of the trade to which the insured adventure relates, and therefore need not communicate such facts to the underwriter (*d*). Moreover, where there is a general and notorious practice to insert a certain clause in a particular kind of mercantile contract, the assured is entitled to assume that the underwriter knows that the contract may contain such a clause, and therefore need not inform him of this fact, although the clause may tend to increase the risk (*e*).

SUB-SECT. 3.—*Avoidance of Policy for Misrepresentation.*

Nature of representations in marine insurance.

Distinction between these and warranties.

807. A representation is a verbal or written statement made by the assured or his agent before or at the time of the making of the contract, and it generally consists of verbal communications made, or written instructions shown, by the broker to the insurer. The main distinction in form between a representation and an express warranty is that the former may be made either orally or in writing, and need not be introduced into the policy, whereas the latter must always be in writing and must always be inserted in the policy (*f*).

(*a*) *Mackintosh* v. *Marshall* (1843), 11 M. & W. 116.

(*b*) The evidence was held to be inadmissible in *Carter* v. *Boehm* (1766), 3 Burr. 1905; but was admitted in *Littledale* v. *Dixon* (1805), 1 Bos. & P. (N. R.) 151; *Chaurand* v. *Angerstein* (1791), Peake, 61; *Campbell* v. *Rickards* (1833), 5 B. & Ad. 840; *Berthon* v. *Loughman* (1817), 2 Stark. 258; *Rickards* v. *Murdock* (1830), 10 B. & C. 527, and *Thames and Mersey Marine Insurance Co., Ltd.* v. *Gunford Ship Co., Ltd.*, *Southern Marine Mutual Insurance Association* v. *Gunford Ship Co., Ltd.* (1911), *Times*, 29th June, H. L.; and see *Chapman* v. *Walton* (1833), 10 Bing. 57, 65. As to the admissibility of the evidence of experts, generally, see title EVIDENCE, Vol. XIII., pp. 480 *et seq.*

(*c*) *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531; *Herring* v. *Janson* (1895), 1 Com. Cas. 177, 179; and see *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 595, 610.

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18 (3) (b); *Vallance* v. *Dewar* (1808), 1 Camp. 503; *Ougier* v. *Jennings* (1800), 1 Camp. 505, n.; *Kingston* v. *Knibbs* (1808), 1 Camp. 508, n.; *Salvador* v. *Hopkins* (1765), 3 Burr. 1707; *Freeland* v. *Glover* (1806), 7 East, 457; *Da Costa* v. *Edmunds* (1815), 4 Camp. 142; *Stewart* v. *Bell* (1821), 5 B. & Ald. 238; and as to incorporation of usage in the policy, see p. 344, *ante*; compare *Tennant* v. *Henderson* (1813), 1 Dow, 324, H. L. (where the usage alleged was not established).

(*e*) *Salvador* v. *Hopkins*, *supra*; *The Bedouin*, [1894] P. 1, C. A.; *Asfar & Co.* v. *Blundell*, [1896] 1 Q. B. 123, C. A.; *Charlesworth* v. *Faber* (1900), 5 Com. Cas. 408.

(*f*) See also titles CONTRACT, Vol. VII., p. 435; GUARANTEE, Vol. XV., p. 440.

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There are two other distinctions between a warranty and a representation which it is important to notice. A breach of warranty will avoid the policy, although it does not relate to a matter material to the risk insured against, and in the second place a warranty must be strictly and literally complied with. On the other hand, a misrepresentation will not discharge the underwriter when it is not a material misrepresentation; nor will he be discharged if the representation be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer (*g*).

The Act (*h*) contains the following provisions as to representations:—

The Marine Insurance Act, 1906.

(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract (*h*).

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk (*h*).

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief (*h*).

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer (*h*).

(5) A representation as to a matter of expectation or belief is true if it be made in good faith (*h*).

(6) A representation may be withdrawn or corrected before the contract is concluded (*i*).

(7) Whether a particular representation be material or not is, in each case, a question of fact (*h*).

Promissory representations.

808. According to the third clause of the preceding paragraph the representation may be either a representation as to a matter of fact or as to a matter of expectation or belief (*k*).

Previous to the Act (*l*) a positive statement made before or at the time of the conclusion of the contract that a certain fact or state of things "shall" or "will" thereafter exist was held to amount to a representation which, if not substantially complied with, avoided the policy although the representation was made without fraud (*m*). But it is laid down in later decisions as a principle of the law of contracts in general that a representation

As to express warranties, see p. 418, *post*. As to misrepresentation in general, see title MISREPRESENTATION AND FRAUD.

(*g*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (4). See *Pawson* v. *Watson* (1778), 2 Cowp. 785, *per* Lord MANSFIELD, C.J., at p. 787; and *Von Tungeln* v. *Dubois* (1809), 2 Camp. 151; *Nonnen* v. *Reid*, *Nonnen* v. *Kettlewell* (1812), 16 East, 176, 186.

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20.

(*i*) The time of conclusion of the contract is defined by s. 21 (*ibid.*); see p. 348; note (*c*), p. 405, *ante*.

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (3).

(*l*) *I.e.*, before 1st January, 1907 (*ibid.*, s. 93).

(*m*) *Pawson* v. *Watson*, *supra*; *Dennistoun* v. *Lillie* (1821), 8 Bli. 202, H. L.

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of a future fact, if binding at all, can only be binding as a contract or promise (*n*). It is submitted that this view is adopted in the above definition, and consequently that promissory representations of future facts cannot be considered as representations within the meaning of the Act. If this view be correct, it follows that the fact of such "promissory representations" not being fulfilled will not of itself have the effect of discharging the underwriter (*o*).

Material misrepresentation. Absence of fraud.

809. It is not necessary that a representation should be fraudulent in order to avoid the insurance; a representation, if material, though wholly untainted with fraud, will also discharge the underwriter from liability, unless the representation be substantially correct, or unless he knew the truth at the time the contract was concluded (*p*).

It is, however, only a material representation as above defined (*q*) which will entitle the insurer to avoid the contract, and all that has been said (*r*) concerning materiality of circumstances which have to be disclosed to the underwriter, applies to representations made to him. Thus it is not necessary in order to avoid the policy on the ground of misrepresentation that the loss should have arisen from a cause in any way connected with the circumstances or matters represented, the only question being whether the representation was material in the sense above mentioned (*s*).

As to representations of expectation or belief.

810. Where the representation is as to a matter of expectation or belief, it is sufficient if it be made in good faith, that is to say, if the assured *bonâ fide* entertains the expectation or belief (*t*). But where the assured with intention to deceive the underwriter states his belief or expectation as to matters of which he is ignorant, the representation cannot be considered as made in good faith and the insurance may therefore be avoided (*u*).

Representation concerning information received by the assured.

811. The fact represented by the assured may be a statement that he has received certain information. In such case, if he merely submits the information to the underwriter, leaving him to draw his own conclusions from it, there is no untrue representation, and

(*n*) *Jorden* v. *Money* (1854), 5 H. L. Cas. 185; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, 473; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, 360; and see *Beattie* v. *Ebury* (*Lord*) (1872), 7 Ch. App. 777, *per* MELLISH, L.J., at p. 804, and title MISREPRESENTATION AND FRAUD.

(*o*) See the discussion of this in Arnould on Marine Insurance, ss. 542—545.

(*p*) It is submitted that it is rightly argued in Arnould on Marine Insurance, s. 536, that as a fraudulent representation will not avoid the contract (see p. 404, *ante*) if it did not influence the mind of the contracting party, this must *a fortiori* be true of an innocent misrepresentation.

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (2); see p. 405, *ante*.

(*r*) See p. 408, *ante*.

(*s*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (1); *Lynch* v. *Dunsford* (1811), 14 East, 494, Ex. Ch.; and cases cited in note (*t*), p. 408, *ante*, and note (*x*), p. 409, *ante*.

(*t*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (5).

(*u*) See *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, C. A., *per* BOWEN, L.J., at p. 481; *Derry* v. *Peek* (1889), 14 App. Cas. 337; *Pawson* v. *Watson* (1877), 2 Cowp. 785, *per* Lord MANSFIELD, C.J., at p. 788.

the underwriter cannot avoid the policy although the information prove to be incorrect (*a*).

Representations in answer to inquiry.

812. Where a representation has been made in answer to an inquiry by the underwriter, the assured has had notice that the answer would influence the underwriter in taking the risk; and therefore the strongest presumption exists that the matter inquired into was material to be known by the insurer, and any untrue answer will entitle him to avoid the policy (*b*).

Misrepresentation involves concealment.

813. A concealment of a material fact may virtually amount to representation that the fact does not exist, and every misrepresentation evidently involves a concealment of the truth. It consequently follows that some cases which held that the policy was avoided by misrepresentation might have been decided also on the ground that there was concealment of a material fact and *vice versâ* (*c*).

Representation to one of several underwriters.

814. Where there are several underwriters to the same policy a representation to the first has been considered virtually a representation to all, with the result that each subsequent underwriter, when it proved to be false, might on this ground avoid the insurance (*d*); for it has been presumed that the subsequent insurers subscribed the policy upon the faith reposed by them in the skill and judgment of the first. The propriety of this rule has, however, been strongly questioned by judges of great eminence (*e*). It is submitted that the view which will probably be adopted on this subject is that there are two questions of fact to be decided—first, whether in any particular case the subsequent underwriter reasonably relied upon the judgment of the first underwriter, and secondly, whether the latter was misled by the representation.

(*a*) 2 Duer, Law of Marine Insurance, p. 703; *Brine* v. *Featherstone* (1813), 4 Taunt. 869. Where, however, the information communicated to the insurer purports to come from an agent of the assured whose duty it is to supply him with correct intelligence in relation to the subject insured, the incorrectness of the information may discharge the underwriter (*Fitzherbert* v. *Mather* (1785), 1 Term Rep. 12).

(*b*) 2 Duer, Law of Marine Insurance, pp. 580, 581; Phillips, Law of Insurance, s. 542. Lord ESHER, M.R., in *The Bedouin*, [1894] P. 1, C. A., at p. 12, says: "If he," (*i.e.* the assured) "is asked a question—whether a material fact or not—by the underwriters, he must answer it truly. If he answers falsely, with intent to deceive, though it may not be a material fact, it will vitiate the policy." It is submitted, however, that the mere absence of deceit cannot exonerate the assured, otherwise there would be no difference between a representation made spontaneously and one made in answer to an inquiry.

(*c*) *Fitzherbert* v. *Mather* (1785), 1 Term Rep. 12; *Tate* v. *Hyslop* (1885), 15 Q. B. D. 368, C. A.

(*d*) *Pawson* v. *Watson* (1778), 2 Cowp. 785; *Barber* v. *Fletcher* (1779), 1 Doug. (K. B.) 305; *Stackpole* v. *Simon* (1779), 2 Park on Marine Insurance, 8th ed., p. 932 (life policy); *Marsden* v. *Reid* (1803), 3 East, 572, 573; *Feise* v. *Parkinson* (1812), 4 Taunt. 640.

(*e*) *Brine* v. *Featherstone*, *supra*; *Forrester* v. *Pigou* (1813), 1 M. & S. 9, *per* Lord ELLENBOROUGH, at p. 13. It is not extended to representations to later underwriters (*Bell* v. *Carstairs* (1810), 2 Camp. 543; *Brine* v. *Featherstone*, *supra*; *Marsden* v. *Reid*, *supra*). Of course, if the subscription of the first underwriter is procured under a secret understanding that it should not be binding and for the fraudulent purpose of leading others to insure, the policy will be voidable on the ground of fraud. The first underwriter in such cases is in England called "a decoy duck."

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815. The construction of representations is governed by the ordinary rules applicable to the interpretation of clauses in a policy (*f*).

Construction of representations.

816. There are two things which must always be borne in mind in dealing with the numerous cases that have been decided on the subject of concealment and representation. First, as the materiality of matters concealed or of representations made is a question of fact (*g*) and not of law, each case must be decided upon its own particular facts. Secondly, in former times when the parties to a contract were not allowed to give evidence, the courts were obliged in many cases to raise presumptions of fact and to act upon them, but now that the parties can be examined and cross-examined, it is in almost all cases unnecessary and useless to have recourse to any such presumptions of fact.

Observations as to decided cases.

Cancellation of policies void for concealment or misrepresentation.

817. When a policy is avoided for concealment and misrepresentation, it may be ordered to be given up and cancelled (*h*).

SUB-SECT. 4.—*Warranties; their General Nature: Express Warranties.*

(i.) *General Nature.*

Warranties.

818. A warranty is either an undertaking by the assured that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or it is a statement which affirms or negatives the existence of a particular state of facts (*i*). Thus a warranty may be an undertaking that the thing insured is neutral property or that the ship insured sailed on a certain day, or that all was well at a given time, or that the ship shall sail on or before a given day, or that she will depart with convoy etc.

A warranty may be express or implied (*k*).

Express warranty.

Nothing can be an express warranty unless it is included in or written upon the policy, whether in the margin or at the foot, or transversely, or is contained in some document incorporated therein by reference (*l*).

Implied warranty.

A warranty is implied if it is a condition implied by law, such as,

(*f*) *Chaurand* v. *Angerstein* (1791), 1 Peake, 61; *Freeland* v. *Glover* (1806), 7 East, 457, 462; *Kirby* v. *Smith* (1818), 1 B. & Ald. 672, 675.

(*g*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (7). As to the word "warranty," when used in the "memorandum," see note (*o*), p. 420, and p. 461, *post*.

(*h*) *Rivaz* v. *Gerussi* (1880), 6 Q. B. D. 222, C. A.; *Brooking* v. *Maudslay, Son & Field* (1888), 38 Ch. D. 636. See also titles EQUITY, Vol. XIII., pp. 52, 53; GUARANTEE, Vol. XV., pp. 507, 543, 544; MISREPRESENTATION AND FRAUD.

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 33 (1).

(*k*) *Ibid.*, s. 33 (2). As to express warranties, see p. 418, *post*; as to implied warranties, see p. 422, *post*.

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 35 (2); *Blackhurst* v. *Cockell* (1789), 3 Term Rep. 360; *Pawson* v. *Barnevelt* (1779), 1 Doug. (K. B.) 12, n. [4]; see *Bensaude* v. *Thames and Mersey Marine Insurance Co.*, [1897] A. C. 609, *per* Lord HALSBURY, at p. 612. In *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1876), 1 Q. B. D. 563, Ex. Ch., POLLOCK, B., and BRETT, J., expressed the view at pp. 586, 588, that parol evidence is admissible to show what documents were intended by the parties to form one contract of insurance. *Sed quære*, unless the documents are connected by reference. See, generally, titles CONTRACT, Vol. VII., p. 525; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 448—453; EVIDENCE, Vol. XIII., p. 568; GUARANTEE, Vol. XV., p. 467.

for example, a warranty in a voyage policy that the ship is seaworthy at the commencement of the voyage, or that she will not deviate from the prescribed or usual course of the voyage.

Essential characteristics.

The essential characteristic of a warranty is that it must be exactly complied with, whether it be material to the risk or not. If it be not complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach, but without prejudice to any liability incurred by him before that date (*m*).

Breach of warranty.

Any inquiry into the materiality or immateriality to the risk is entirely precluded, and so are all questions, whether there has or has not been a substantial compliance with the warranty; and, where a warranty has been broken, although the loss may not have been in the remotest degree connected with the breach, the underwriter is none the less discharged on that account from all liability for the loss (*n*). Thus where a ship, warranted to sail with convoy, in fact sails without it and is lost in a storm, the underwriter is not liable for the loss (*o*).

Where a warranty is broken the assured cannot avail himself of the defence that the breach has been remedied and the warranty complied with before the loss, for as soon as the breach occurs the underwriter is *ipso facto* discharged from liability (*p*).

No excuse for non-compliance with express warranty.

819. Subject to the exceptions mentioned in the next paragraph, no cause, however irresistible, will excuse non-compliance with an express warranty, not even the direct and unavoidable operation of a peril expressly insured against. In short, the warranty is an absolute condition precedent (*q*). A breach of warranty, whether express or implied, enables the insurer to avoid the contract as from the date of the breach, and therefore *in toto*, if the breach takes place at the commencement of the risk (*r*).

Cases in which non-compliance excused.

820. Non-compliance with an express warranty is excused—first, if the state of things contemplated by the warranty ceases; thus if, during a war, a warranty to sail with convoy at a given future time be inserted in the policy, the intervention of peace before that period would excuse the necessity of compliance on the principle that *cessante ratione cessat lex:* secondly, when the compliance with the warranty is rendered unlawful by any subsequent law (*s*).

Waiver by insurer.

A warranty, whether express or implied, may be waived by the insurer (*t*), but an express warranty does not exclude an implied

(*m*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 33 (3).

(*n*) *Newcastle Fire Insurance Co.* v. *Macmorran & Co.* (1815), 3 Dow, 255, H. L., *per* Lord ELDON (fire policy); *De Hahn* v. *Hartley* (1786), 1 Term Rep. 343; affirmed (1787), 2 Term Rep. 186, n., Ex. Ch. (no reason given).

(*o*) *Hibbert* v. *Pigou* (1783), Marshall on Marine Insurance, 4th ed., pp. 280, 289, 292.

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 34 (2); *Hibbert* v. *Pigou*, *supra*.

(*q*) *Hore* v. *Whitmore* (1778), 2 Cowp. 784. *Havelock* v. *Hancill* (1789), 3 Term Rep. 277, is not, as has been sometimes supposed, any authority to the contrary; see *Cory* v. *Burr* (1883), 8 App. Cas. 393, *per* Lord BLACKBURN, at p. 401.

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 33 (3).

(*s*) *Ibid.*, s. 34 (1).

(*t*) *Ibid.*, s. 34 (3); see p. 423, *post*.

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warranty unless it be inconsistent therewith (*a*). Thus if a policy on cattle provides that the fittings of a ship are to be approved by Lloyd's surveyor and they are so approved by him, the warranty of seaworthiness is not excluded by the express provision as to the approval of the fittings (*a*).

(ii.) *Express Warranties.*

Express warranties.

821. An express warranty may be in any form of words from which the intention to warrant may be inferred (*b*). The word "warranty" or "warranted," for instance, is in no case necessary. The words "to sail on such a day," or "in port," or "all well" on such a day etc., if written on the face of the policy, amount to an express warranty as much as any formal clause, and even the description of the vessel insured as being of a certain nation, as a Danish brig or the Swedish ship "Sophia," will amount to an express warranty of her nationality (*c*). But it is sometimes a question, especially in time policies effected with mutual assurance associations, whether a clause which purports to be a warranty should not be held to be an exception and not a warranty (*d*).

Interpretation.

822. Speaking generally, the same rules of construction apply to the interpretation of a warranty as apply to any other part of the policy. Thus in order to carry out the presumed intention of the parties a clause "warranted no iron" has been held to cover steel, and the word "seamen" has been held to include boys as well as adult mariners (*e*).

All kinds of warranties are inserted in policies to meet the various exigencies of commerce. It is of little use to refer in any detail to the numerous cases in which these clauses have been interpreted, because not only their forms but the usages which

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 35 (3); *Sleigh* v. *Tyser*, [1900] 2 Q. B. 333; *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. 234; compare *Greenock Steamship Co.* v. *Maritime Insurance Co.*, [1903] 1 K. B. 367.

(*b*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 35 (1).

(*c*) *Kenyon* v. *Berthon* (1778), 1 Doug. (K. B.) 12, n. [4]; *Baring* v. *Clagett* (1802), 3 Bos. & P. 201; *Baring* v. *Christie* (1804), 5 East, 398, Ex. Ch.; *Lothian* v. *Henderson* (1803), 3 Bos. & P. 499, H. L.; compare *Clapham* v. *Cologan* (1813), 3 Camp. 382; *Dent* v. *Smith* (1869), L. R. 4 Q. B. 414 (no implied warranty against change of nationality). A strained construction must not, however, be put on a statement in the policy so as to make it a warranty (*Muller* v. *Thompson* (1811), 2 Camp. 610). Calling a vessel the "good ship A" in a time policy is not a warranty of seaworthiness (*Small* v. *Gibson* (1850), 19 Q. B. 141, 157, Ex. Ch.; affirmed *sub nom. Gibson* v. *Small* (1853), 4 H. L. Cas. 353.

(*d*) See *Colledge* v. *Harty* (1851), 6 Exch. 205 (clause held to be a warranty).

(*e*) *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. 499, C. A.; *Bean* v. *Stupart* (1778), 1 Doug. (K. B.) 11. As to the meaning of "warranted uninsured," see *Roddick* v. *Indemnity Mutual Marine Insurance Co.*, [1895] 2 Q. B. 380, C. A.; and *General Insurance Co. of Trieste (Assicurazioni Generali)* v. *Cory*, [1897] 1 Q. B. 335; and compare *Thames and Mersey Marine Insurance Co., Ltd.* v. *Gunford Ship Co., Ltd.*, *Southern Marine Mutual Insurance Association* v. *Gunford Ship Co., Ltd.* (1911), *Times*, 29th June, H. L. See also title DEED AND OTHER INSTRUMENTS, Vol. X., pp. 437, 450. Where a ship is insured "in any lawful trade" these words must be confined to the trade on which the ship is sent by her owners, and therefore the assured who has sent her on a lawful voyage is not precluded from recovery for a loss occasioned by he

affect their construction are constantly changing. It suffices briefly to direct attention to certain of the more usual and important navigation warranties.

Warranties as to safety or time of sailing or departing from particular time or place.

823. Where a ship is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day (*f*). A warranty that the ship was in port at a given day would be construed in the same way (*g*). Where a ship is warranted to sail or depart before or after a given day, the warranty must be strictly fulfilled, and if she sails or departs, in the former case after, and in the latter case before, the prescribed day, the underwriter is discharged from liability although the loss is not in the remotest degree connected with the time of her sailing or departing (*h*).

Where a ship is insured "at and from" an island, the whole island is considered as one *terminus a quo*, and the ship is not considered as having sailed on her voyage till she has cleared away from the island with the purpose of proceeding directly to the *terminus ad quem* (*h*).

In order to satisfy a general warranty to sail on or before a given day the ship need not on or before that day proceed to any distance on her voyage, but she must have moved from her moorings on or before that day with the *bonâ fide* intention of prosecuting the voyage (*i*), and not solely for the sake of complying with the warranty (*k*).

Where a warranty is not merely a general warranty but a warranty to sail or depart from a given port before a given day, it is not enough that she has sailed; she must have left the port before that day (*l*).

When, however, a voyage consists of different stages, such as a river and a sea voyage, and the usual course of navigation is to perform them with different crews or equipments, the general warranty to sail on or before a given date only requires the vessel

being barratrously employed in a smuggling trade (*Havelock* v. *Hancill* (1789), 3 Term Rep. 277).

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 38; *Blackhurst* v. *Cockell* (1789), 3 Term Rep. 360.

(*g*) As to when a ship is "in port," see *Hunter* v. *Northern Marine Insurance Co.* (1888), 13 App. Cas. 717.

(*h*) *Vezian* v. *Grant* (1779), Marshall on Marine Insurance, 4th ed., p. 284; and see *Kenyon* v. *Berthon* (1778), 1 Doug. (K. B.) 12, n. [4]; *Cruickshank* v. *Janson* (10), 2 Taunt. 301.

(*i*) *Bond* v. *Nutt* (1777), 2 Cowp. 601; *Earle* v. *Harris* (1780), 1 Doug. (K. B.) 357; *Thellusson* v. *Fergusson* (1780), 1 Doug. (K. B.) 361; *Thellusson* v. *Staples*, *Thellusson* v. *Pigou* (1780), 1 Doug. (K. B.) 366, n. [9]; *Cockrane* v. *Fisher* (1835), 1 Cr. M. & R. 809, Ex. Ch.; compare *Cruickshank* v. *Janson*, *supra*; *Sea Insurance Co.* v. *Blogg*, [1898] 2 Q. B. 398, C. A.; *Mersey Mutual Underwriting Association* v. *Poland* (1910), 26 T. L. R. 386.

(*k*) *Ridsdale* v. *Newnham* (1815), 3 M. & S. 456; *Pittegrew* v. *Pringle* (1832), 3 B. & Ad. 514; *Graham* v. *Barras* (1834), 5 B. & Ad. 1011.

(*l*) *Moir* v. *Royal Exchange Assurance Co.* (1815), 3 M. & S. 461; s. c. 6 Taunt. 241; *Lang* v. *Anderdon* (1824), 3 B. & C. 495, 500. On an insurance on ship at and from New York to Quebec, during her stay there, and thence to the United Kingdom, the ship being warranted to sail from Quebec on or before the 1st November, the court held that the warranty only applied to the part of the voyage between Quebec and England, and that therefore the underwriters were liable for the loss of the ship between New York and Quebec after the 1st November (*Baines* v. *Holland* (1855), 10 Exch. 802).

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to sail on the earlier stage in the condition in which that part of the voyage is usually performed (*m*).

Warranty "free from capture etc." in port or ports.

824. In the Napoleonic wars a warranty or stipulation was often inserted in the policy that the underwriter should not be answerable for the risk of capture, seizure, or confiscation in the ship's port of discharge, or in port or ports generally (*n*).

The modern Lloyd's form of the warranty against capture etc. is as follows: "Warranted free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." The meaning and effect of this clause, and of the warranty contained in what is called the "memorandum," is discussed elsewhere (*o*).

Warranty of neutrality.

825. There is no implied warranty as to the nationality of a ship or that her nationality shall not be changed during the risk (*p*), but it often happens in time of war that the assured warrants the ship or goods to be neutral. Such a warranty is called "a warranty of neutrality." If the property is enemy's property, or ceases to have the character of neutrality, because employed, used, or dealt with in such a manner as to be liable to capture, the warranty is broken (*q*). For instance, if a ship violates the law of blockade or is used in transporting enemy's troops, or is engaged in the privileged colonial or coasting trade of the enemy, or is carrying contraband goods to the enemy, the ship in the former cases, and the goods in the last case, are not of a neutral character. What is meant by the word "enemy," whether enemy by birth or by commercial domicil, and in what circumstances property is or becomes enemy's property or forfeits its neutral character, are questions sometimes of considerable difficulty, appertaining to international and prize law and not to insurance law (*r*).

(*m*) *Bouillon* v. *Lupton* (1863), 15 C. B. (N. S.) 113. The two cases of *Ridsdale* v. *Newnham* (1815), 3 M. & S. 456, and *Pittegrew* v. *Pringle* (1832), 3 B. & Ad. 514, are scarcely reconcilable with the judgment in *Bouillon* v. *Lupton*, *supra*. As to the meaning of warranties "not allowed to enter the Gulf of St. Lawrence before" a certain date, "no St. Lawrence between certain dates," see *Provincial Insurance Co. of Canada* v. *Leduc* (1874), L. R. 6 P. C. 224, and *Birrell* v. *Dryer* (1884), 9 App. Cas. 345. See also title CUSTOM AND USAGES, Vol. X., p. 265.

(*n*) For the construction applied to these words, see *Dalgleish* v. *Brooke* (1812), 15 East, 295; *Oom* v. *Taylor* (1812), 3 Camp. 204; *Maydhew* v. *Scott* (1812), 3 Camp. 205; *Jarman* v. *Coape* (1811), 13 East, 394, 398; *Keyser* v. *Scott* (1812), 4 Taunt. 660; *Reyner* v. *Pearson* (1812), 4 Taunt. 662; *Levin* v. *Newnham* (1813), 4 Taunt. 722, Ex. Ch.; *Mellish* v. *Staniforth* (1811), 3 Taunt. 499; *Levy* v. *Vaughan* (1812), 4 Taunt. 387; *Levi* v. *Allnutt* (1812), 15 East, 267, *per* Lord ELLENBOROUGH, C.J., at p. 269; *Brown* v. *Tierney* (1809), 1 Taunt. 517; *Baring* v. *Vaux* (1810), 2 Camp. 541.

(*o*) See p. 443, and p. 458, *post*. The word "warranted," when followed by the word "free," as in "free from capture," "free of particular average" etc., is used in a very different sense from that defined in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 33. In these cases it only has the effect of exempting the underwriter from liability for losses of the nature specified in the warranty. For a modern case on this clause, see *Andersen* v. *Marten*, [1908] A. C. 334; compare *Otago Farmers' Co-operative Association of New Zealand* v. *Thompson*, [1910] 2 K. B. 145.

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 37; *Clapham* v. *Cologan* (1813), 3 Camp. 382; *Dent* v. *Smith* (1869), L. R. 4 Q. B. 414.

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 36 (1).

(*r*) See title PRIZE LAW AND JURISDICTION.

Again, by the general law of nations, and sometimes under treaties, a ship is bound to carry certain necessary documents to establish her neutrality, and if she makes default in so doing, or if she falsifies or suppresses her papers or uses simulated papers, she may render herself liable to capture. In what circumstances she may so render herself liable is also a question belonging to prize or international law (*s*).

Provisions as to the warranty of neutrality.

826. The Act (*t*) contains, however, two provisions relating to the matters referred to in the preceding paragraph, which to a certain extent modify previous decisions. The first is as follows: Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk (*u*).

Implied condition of neutrality at commencement of risk.

Therefore if the property has not a neutral character at the commencement of the risk, the insurer can avoid the policy (*v*); but if the property has lost its neutral character after the commencement of the risk, the insurer's liability depends upon whether this could have been prevented by the assured or his agents. For instance, the underwriter will not be discharged from liability if after the date of the insurance a war has broken out which has made the property enemy's property; nor would an insurer of goods be discharged from liability if after the commencement of the risk the ship for the same reason ceased to have a neutral character (*a*).

Implied condition that ship shall be properly documented.

The second provision is as follows:—Where a ship is expressly warranted "neutral," there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract (*b*).

This provision, it will be observed, is applicable, so far as the assured can control the matter, only to the case of the ship being and warranted neutral and to the ship's documents not being in order. In such case the insurer is not liable for any loss occurring through breach of the condition. It seems, however, that he remains liable for any previous loss (*c*).

(*s*) See title PRIZE LAW AND JURISDICTION.

(*t*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 36.

(*u*) *Ibid.*, s. 36 (1).

(*v*) *Woolmer* v. *Muilman* (1763), 1 Wm. Bl. 427.

(*a*) *Eden* v. *Parkison* (1781), 2 Doug. (K. B.) 732.

(*b*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 36 (2).

(*c*) Proper documents are those required by the general law of nations or by treaty, and do not include those which are only required by the ordinances of the belligerent power (*Price* v. *Bell* (1801), 1 East, 663; *Bell* v. *Bromfield* (1812), 15 East, 364, 368). As to the want of proper documents where there is no warranty of neutrality, see note (*e*), p. 425, *post*. As the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 36, overrides certain previous decisions, *e.g.*, *Rich* v. *Parker* (1798), 7 Term. Rep 705, and as it is clear and precise, it seems useless to refer in detail to the previous cases, and it is sufficient to mention the following in addition to those already cited:—*Baring* v. *Clagett* (1802), 3 Bos. & P. 201; *Mayne* v. *Walter* (1782), Marshall on Marine Insurance, 4th ed.,

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Warranty against contraband.

827. If in a policy on goods there is a warranty against contraband, and some of the goods are contraband, the policy is void *in toto* (*d*).

The carriage of a belligerent's despatches, or of military or naval persons in his service, in circumstances which render the ship liable to condemnation is a breach of the warranty of neutrality. But the carriage of naval officers is not a breach of warranty against "contraband of war," inasmuch as in legal and commercial language the word "contraband" is not applied to persons, but to goods (*e*).

Effect of sentence of a prize court.

828. The sentence of a prize court of competent jurisdiction condemning captured property (*f*) is a judgment *in rem*, giving a good title as against all the world. But the English courts, after much hesitation, have gone further, and have held that the sentence of a competent prize court (either of an enemy's or of a neutral country) is, in actions on a marine policy, conclusive as to the existence of the ground on which the court professes to decide. In certain cases, even where the ground on which the sentence must have been based, though not expressed, may be clearly inferred from the whole of the judgment to have been that the property was not neutral, this inference has been held conclusive in an action on the policy (*g*).

SUB-SECT. 5.—*Implied Warranties.*

(i.) *Of Seaworthiness.*

Implied warranties.

Warranty of seaworthiness.

829. In a voyage policy, whether on ship, goods, freight or other insurable property, there is an implied warranty that at the commencement of a voyage the ship shall be seaworthy for the purpose of the particular adventure insured, that is, that she is reasonably fit in all respects to encounter the ordinary perils of the seas of such adventure (*h*).

This warranty of seaworthiness at the commencement of the voyage may be excluded by express terms or clauses in the policy, if, but only if, these are absolutely inconsistent with such warranty (*i*).

p. 338; *Barzillay* v. *Lewis* (1782), Marshall on Marine Insurance, 4th ed., p. 339; *Garrels* v. *Kensington* (1799), 8 Term Rep. 230; *Pollard* v. *Bell* (1800), 8 Term Rep. 434; *Bird* v. *Appleton* (1800), 8 Term Rep. 562; *Tabbs* v. *Bendelack* (1801), 4 Esp. 108; *Siffken* v. *Lee* (1807), 2 Bos. & P. (N. R.) 484; *Barker* v. *Blakes* (1808), 9 East, 283; *Le Cheminant* v. *Pearson*, *Le Cheminant* v. *Allnutt* (1812), 4 Taunt. 367, 379.

(*d*) *Seymour* v. *London and Provincial Marine Insurance Co.* (1872), 41 L. J. (C. P.) 193.

(*e*) *Yangtsze Insurance Association* v. *Indemnity Mutual Marine Assurance Co.*, [1908] 1 K. B. 911; affirmed 2 K. B. 504, C. A.

(*f*) *Hughes* v. *Cornelius* (1682), 2 Show. 232; 2 Smith, L. C., 11th ed., 741.

(*g*) *Lothian* v. *Henderson* (1803), 3 Bos. & P. 499, H. L.; *Bolton* v. *Gladstone* (1805), 5 East, 155, 160; affirmed (1809), 2 Taunt. 85, Ex. Ch. In this respect prize cases are exceptional (*Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455, 463, C. A.; *Hobbs* v. *Henning* (1864), 17 C. B. (N. S.) 791, 823). See titles CONFLICT OF LAWS, Vol. VI., pp. 290, 297, 298; ESTOPPEL, Vol. XIII., p. 340; PRIZE LAW AND JURISDICTION.

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 39 (1), (4). As to the implied warranty of legality, see p. 428, *post*. As to the implied condition against deviation and delay, see p. 395, *ante*. As to the absence of warranty of seaworthiness in a time policy, see p. 428, *post*.

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 35 (3).

Thus where losses from rottenness, inherent defects, and other unseaworthiness are excepted, the warranty of seaworthiness at the commencement of the voyage will nevertheless subsist, so that if the vessel started with a defective boiler, the underwriter can avoid the policy (*k*).

Warranty may be excluded by express words and may be waived.

830. The warranty will be *pro tanto* neutralised by the common clause "held covered in case of any breach of warranty at a premium to be hereinafter arranged" (*l*), and it will be excluded by the clause "ship allowed to be seaworthy for the voyage" (*m*). The warranty, moreover, like any other warranty, may be waived by the underwriter either by memorandum or note on the policy, or by his act, such as acceptance of notice of abandonment, affirming the policy after knowledge of the breach of warranty (*n*).

Warranty is an absolute condition. Its breach discharges from the date of the breach.

831. In the absence of waiver, or of some clause affecting its operation, a breach of warranty of seaworthiness will discharge the underwriter from liability as from the time of such breach, although the loss be wholly unconnected therewith, and even though the unseaworthiness be remedied before the loss (*o*).

It does not matter that the unseaworthiness was caused by the acts of strangers or by inevitable accident, or that the assured acted with perfect good faith and did not know, and had no means of knowing, of the ship's unseaworthiness (*p*). If the vessel in fact was not seaworthy the underwriter is not liable. In short, in a voyage policy the seaworthiness of the ship at the commencement of the voyage is, unless the warranty be waived by the underwriter or excluded by clear and express terms in the policy, an absolute condition precedent to the liability of the underwriter for any loss subsequent to the breach (*q*).

Meaning of "reasonably fit."

832. The vessel must be reasonably fit (*r*). Seaworthiness is a relative term and may vary with the class of the ship insured.

(*k*) *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. 234; see also *Sleigh* v. *Tyser*, [1900] 2 Q. B. 333.

(*l*) *Greenock Steamship Co.* v. *Maritime Insurance Co.*, [1903] 1 K. B. 367 (where it was held that the additional premium which the underwriters would have been entitled to charge would have at least equalled the loss sustained, so that the assured recovered nothing); *Mentz, Decker & Co.* v. *Maritime Insurance Co.* (1909), 101 L. T. 808.

(*m*) *Parfitt* v. *Thompson* (1844), 13 M. & W. 392; *Phillips* v. *Nairne* (1847), 4 C. B. 343.

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 34 (3); *Provincial Insurance Co. of Canada* v. *Leduc* (1874), L. R. 6 P. C. 224 (express warranty). In *Weir* v. *Aberdeen* (1819), 2 B. & Ald. 320, as explained in *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. 234, by Lord PENZANCE, at p. 244, the warranty of seaworthiness was waived by a memorandum on the policy.

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 34 (2); *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada, supra*, at p. 244, following *Forshaw* v. *Chabert* (1821), 3 Brod. & Bing. 158.

(*p*) *The Glenfruin* (1885), 10 P. D. 103; *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada, supra.*

(*q*) *Douglas* v. *Scougall* (1806), 4 Dow, 269, *per* Lord ELDON, L.C., at p. 276, H. L.

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 39 (1), (4).

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Thus a river steamer insured for a sea voyage need not be made as fit for the voyage as an ocean-going vessel. She need only be made as seaworthy as is reasonably practicable by ordinary available means (*s*).

Seaworthiness is a relative term.

Moreover, the standard of seaworthiness varies with the nature of the voyage insured; the vessel may be seaworthy for one voyage but not for another, for a voyage at one season of the year and not for a voyage at another season; she may be seaworthy when laden with one kind of cargo and not so when laden with another kind (*t*).

Fitness "in all respects."

833. The ship must be reasonably fit in all respects. She must be competent in hull to encounter the ordinary perils of the seas and properly equipped with the necessary sails, tackle, stores, supplies, provisions, medicines, and other things requisite for the safety of the voyage and those on board of her, and, if a steamship, she must have her engines and boilers in sound and proper condition, and also an adequate supply of coal for the voyage (*a*).

Temporary defect.

A temporary defect, however, in the ship's condition, due to some negligence at the time of sailing, does not constitute a breach of the warranty of seaworthiness, provided that the state of the ship be such that, if the master and crew do their duty, the defect can be remedied or any danger from it averted. Thus the ship is not unseaworthy on account of her porthole being improperly left open at the commencement of the voyage if it can be readily closed at sea whenever necessary (*b*).

Necessity of competent crew.

The vessel must also at the commencement of the voyage be properly manned with a competent master and a competent and adequate crew, and must have a pilot on board at the port of departure in cases where there is an establishment of pilots at that port and the nature of the navigation requires one (*c*).

(*s*) *Burges* v. *Wickham* (1863), 3 B. & S. 669; *Clapham* v. *Langton* (1864), 34 L. J. (Q. B.) 46, Ex. Ch. But the underwriter may be entitled to avoid the policy, if the fact of the ship being only a river steamer is material to the risk and has not been disclosed to him.

(*t*) "The ship should be in a condition to encounter whatever perils of the sea a ship of that kind and laden in that way may be fairly expected to encounter" on the voyage insured (*Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72, *per* Lord CAIRNS, L.C., at p. 77; *Daniels* v. *Harris* (1874), L. R. 10 C. P. 1 (ship laden with deck cargo); *Stanton* v. *Richardson*, *Richardson* v. *Stanton* (1874), L. R. 9 C. P. 390, Ex. Ch.; affirmed (1875), 45 L. J. (Q. B.) 78, H. L. (cargo of wet sugar).

(*a*) Rotten sails, a defective boiler and deficient ground tackle make the ship unseaworthy: *Wedderburn* v. *Bell* (1807), 1 Camp. 1 (sails); *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. 234; *Wilkie* v. *Geddes* (1815), 3 Dow, 57, H. L.; *Woolf* v. *Claggett* (1800), 3 Esp. 257 (medicines etc.); *Thin* v. *Richards & Co.*, [1892] 2 Q. B. 141, C. A.; *Greenock Steamship Co.* v. *Maritime Insurance Co.*, [1903] 1 K. B. 367 (coal).

(*b*) *Steel* v. *State Line Steamship Co.*, *supra*; *Hedley* v. *Pinkney & Sons Steamship Co.*, [1892] 1 Q. B. 58, C. A.; *Gilroy, Sons & Co.* v. *Price & Co.*, [1893] A. C. 56 (where the defect was not capable of easy remedy, and unseaworthiness was found).

(*c*) *Tait* v. *Levi* (1811), 14 East, 481; *Shore* v. *Bentall* (1828), 7 B. & C. 798, n.; *Phillips* v. *Headlam* (1831), 2 B. & Ad. 380, *per* PARKE, J., at p. 383. It seems clear that sailing without a pilot from a port where pilotage is compulsory, or with an uncertificated master or mate or engineer contrary to statute, cannot make the voyage illegal and the policy void on that ground. As to illegal insurances, see p. 429, *post*.

The vessel need only be fit to encounter "the ordinary perils of the seas," and on looking at the definitions given in the Act (*d*) of "maritime perils" and of "perils of the seas," it is clear that the latter expression does not include capture, arrest, or detention. It follows, therefore, that a vessel may be seaworthy though not properly documented at the commencement of the voyage (*e*).

No warranty that the ship should continue seaworthy.

834. There is no warranty or condition that a ship originally seaworthy for the voyage insured shall continue to be seaworthy, or that the master and crew should do their duty during the voyage. Therefore the negligence and misconduct of master and crew after the voyage has commenced is no defence to an action on the policy where the loss has been immediately occasioned by the perils insured against (*f*). Even when the policy is on a voyage out and home (the risk being entire and indivisible), it is sufficient if the ship be seaworthy for the entire voyage when she first sails from the home port of lading (*g*).

Fitness to encounter perils of the port.

835. There are, however, two exceptions to, or modifications of, the rule that the warranty of seaworthiness is not satisfied unless the ship is seaworthy for the whole voyage insured.

First, where the policy attaches while the ship is in port, there is an implied warranty that the ship shall at the commencement of the

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 3, Sched. I., rr. 7, 10. *Wedderburn* v. *Bell* (1807), 1 Camp. 1, so far as it decides the contrary, would seem to be superseded.

(*e*) When there is no warrant of neutrality, want of proper documents has been held to discharge the underwriter only in the case of insurance on ship, and if the loss arose from condemnation on that ground (*Dawson* v. *Atty* (1806), 7 East, 367, as explained in *Bell* v. *Carstairs* (1811), 14 East, 374, *per* Lord ELLENBOROUGH, C.J., at p. 393; *Carruthers* v. *Gray* (1811), 3 Camp. 142; (1812) 15 East, 35; *Hobbs* v. *Henning* (1864), 17 C. B. (N. S.) 791). These decisions may be rested either on an implied condition, in case of insurance against capture, that the ship shall be properly documented, or on the principle that the want of proper documents was the proximate cause of loss (*Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co., Trinder, Anderson & Co.* v. *North Queensland Insurance Co., Trinder, Anderson & Co.* v. *Weston, Crocker & Co.*, [1898] 2 Q. B., 114, C. A., *per* COLLINS, L.J., at p. 128; and see *Price* v. *Bell* (1801), 1 East, 663, *per* LAWRENCE, J., at p. 673). If, therefore (which, however, is very doubtful), any cases have decided that a ship is unseaworthy because not properly documented at the time of sailing, they must, it is submitted, be considered to be overruled by the Act.

(*f*) *Dixon* v. *Sadler* (1839), 5 M. & W. 405, *per cur.*, at pp. 414, 415; affirmed *sub nom. Sadler* v. *Dixon* (1841), 8 M. & W. 895, Ex. Ch.; *Bermon* v. *Woodbridge* (1781), 2 Doug. (K. B.) 781, *per* Lord MANSFIELD, C.J., at p. 788; *Eden* v. *Parkison* (1781), 2 Doug. (K. B.) 732, 735; *Watson* v. *Clark* (1813), 1 Dow, 336, H. L., *per* Lord ELDON, L.C., at p. 344; *Busk* v. *Royal Exchange Assurance Co.* (1818), 2 B. & Ald. 73; *Biccard* v. *Shepherd* (1861), 14 Moo. P. C. C. 471. For cases where negligence was the remote cause of loss, see also *Walker* v. *Maitland* (1821), 5 B. & Ald. 171; *Bishop* v. *Pentland* (1827), 7 B. & C. 219; *Holdsworth* v. *Wise* (1828), 7 B. & C. 794; *Shore* v. *Bentall* (1828), 7 B. & C. 798, n.; *Phillips* v. *Headlam* (1831), 2 B. & Ad. 380; *Redman* v. *Wilson* (1845), 14 M. & W. 476; *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284, 296. There is no express provision in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), that the ship must be seaworthy only at the commencement of the voyage; but it is clear from the enactments it contains (see *ibid.*, s. 39 (5)) relating to different stages of the voyage that it does not alter the law as established by the above cited cases.

(*g*) *Bermon* v. *Woodbridge, supra; Redman* v. *Wilson, supra.*

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risk be reasonably fit to encounter the ordinary perils of the port (*h*), that is to say, she must be capable of being moved from one part of the harbour to another for the purpose of repairs, and of being moored alongside the wharves and quays there (*i*). If this warranty is satisfied, the policy is in force whilst the ship remains in port, and the underwriters are liable for losses occurring during that period; but in order that the policy may continue in force so as to cover the voyage insured she must be seaworthy for such voyage (*k*).

Seaworthiness at different stages of the voyage.

A second exception, which, however, seems only to be a particular instance of the former one, is the following: Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of, or further, preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of her preparation or equipment for the purposes of that stage (*l*). Thus when a steamer is insured at and from Lyons to Galatz, and sails with a river crew and captain, and without her masts and anchors and other heavy articles, which it is impossible for her to carry on the river voyage, and afterwards takes on board her sea captain and some of her seagoing crew, and is otherwise fitted for the voyage to Galatz, the ship will have satisfied the warranty of seaworthiness, if she was riverworthy when she left Lyons and seaworthy when she sailed from Marseilles (*m*).

In such cases as the foregoing the ship could not at the outset be made reasonably fit for the whole voyage, and therefore in order to reconcile the interests of the assured on the one hand and those of the underwriter on the other, it is held that the whole voyage must be divided into two stages, and that it is necessary and sufficient for the ship to be seaworthy at the commencement of each of those stages. This principle has been very recently applied to cases where a steamship cannot and does not at the commencement of the voyage carry enough coals for the whole of the insured voyage, and is therefore insured to take in coal at some further port or ports. In such cases it lies upon the shipowner, in order to disprove the defence of unseaworthiness, to show that he was obliged to divide and had divided the voyage into stages for coaling purposes by reason of the necessities of the case, and that at the commencement of each stage the ship had on board sufficient coal for that stage—in other words, that she was seaworthy for each stage. It further seems that it is a matter for proof as to how the necessities of the case require that voyage to be divided into stages (*n*).

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41) s. 39 (2).

(*i*) *Parmeter* v. *Cousins* (1809), 2 Camp. 235; *Buchanan & Co.* v. *Faber* (1899), 4 Com. Cas. 223.

(*k*) *Annen* v. *Woodman* (1810), 3 Taunt. 299.

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41) s. 39 (3), which is evidently intended to embody the law laid down in *Bouillon* v. *Lupton* (1863), 15 C. B. (N. S.) 113, and the judgment of the Court of Exchequer in *Dixon* v. *Sadler* (1839), 5 M. & W. 405, 414, affirmed *sub nom. Sadler* v. *Dixon* (1841), 8 M. & W. 895, Ex. Ch. (without touching this point).

(*m*) *Bouillon* v. *Lupton*, *supra*.

(*n*) *The Vortigern*, [1899] P. 140, 155, C. A., following *Thin* v. *Richards*

Suggested exception to the rule that the ship need only be seaworthy at the commencement of the voyage.

836. A third exception has been suggested to the general rule that a warranty of seaworthiness attaches to the ship only at the commencement of a voyage. A policy cannot generally be avoided by the neglect of the master to take on board a pilot at proper places in the course of the insured voyage, but it has been suggested that perhaps there is a breach of the warranty of seaworthiness if, in a case where the master is required by Act of Parliament to take the services of a pilot, he makes default in so doing, on the ground that the passage over the pilotage district may be considered as a distinctly intermediate voyage (*o*).

Ship must be seaworthy to carry the goods.

837. In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy (*p*). Thus the warranty is not satisfied in a policy on a deck cargo if in ordinary rough weather the goods must be jettisoned, although this could be done without difficulty and the ship could then perform the voyage with safety to herself (*q*).

Similarly if a ship is laden with a cargo of wet sugar and the pumps are not sufficient for the drainage of the cargo and the ordinary leakage of the vessel, so that she cannot safely undertake the intended voyage with such a cargo on board, the warranty of seaworthiness is not fulfilled (*r*).

& Co., [1892] 2 Q. B. 141, C. A.; *Greenock Steamship Co.* v. *Maritime Insurance Co.*, [1903] 1 K. B. 367; affirmed, [1903] 2 K. B. 657, C. A. These decisions do not seem inconsistent with, and are probably covered by, the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 39 (3).

(*o*) This suggestion was made by PATTESON, J., during the argument in *Hollingworth* v. *Brodrick* (1837), 7 Ad. & El. 40, at p. 44, explaining *Law* v. *Hollingsworth* (1797), 7 Term Rep. 160. See also *Phillips* v. *Headlam* (1831), 2 B. & Ad. 380, 382, 384; *Sadler* v. *Dixon* (1841), 8 M. & W. 895, Ex. Ch., *per* TINDAL, C.J., at p. 900, ; *Gibson* v. *Small* (1853), 4 H. L. Cas. 353, *per* PARKE, B., at p. 398. It is submitted, however, that the above suggestion would probably be held inconsistent with recent cases and with the provisions of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41). As to warranty of seaworthiness of ship, see s. 39 (*ibid.*), and p. 422, *ante*.

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 40 (2).

(*q*) *Daniels* v. *Harris* (1874), L. R. 10 C. P. 1; *Sleigh* v. *Tyser*, [1900] 2 Q. B. 333 (where cattle were insured against mortality, and the ventilation was insufficient, and it was held that the warranty of seaworthiness had not been fulfilled). In *Biccard* v. *Shepherd* (1861), 14 Moo. P. C. C. 471, the policy was on goods "at and from the anchorages off Hondeklip Bay and Port Nolloth to Swansea," from the loading of the goods on board the ship. She took part of her cargo at Hondeklip Bay, and was seaworthy when she sailed thence; but she was overloaded at Port Nolloth, and thus became unseaworthy. The cargo was lost on the voyage, and the Privy Council held that the assured could recover in respect of the cargo shipped at Hondeklip Bay, but not in respect of that shipped at Port Nolloth. The ground of the decision was that, under the words of the policy, two separate risks were insured, one on the parcel of goods shipped at Hondeklip Bay, the other on the parcel shipped at Port Nolloth, and that as to these parcels the voyage began, and therefore the warranty attached at different times.

(*r*) *Stanton* v. *Richardson*, *Richardson* v. *Stanton* (1874), L. R. 9 C. P. 390, Ex. Ch.; affirmed (1875), 45 L. J. (Q. B.) 78, H. L.

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No implied warranty as to seaworthiness of goods in policy on goods.

838. In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy (*s*). Nor does the warranty of seaworthiness which is implied as to the ship extend to lighters employed to land the cargo (*t*).

No warranty of seaworthiness of ship in time policy.

839. In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure (*a*), but where with the privity of the assured a ship is sent to sea in an unseaworthy state the insurer is not liable for any loss attributable to unseaworthiness (*b*).

Admissibility of parol evidence.

840. Whether parol evidence can be given to contradict or qualify the warranty of seaworthiness is, it is submitted, still an open question (*c*).

Burden of proof as to unseaworthiness.

841. Unseaworthiness is a question of fact, the burden of proof on the issue of unseaworthiness being on the underwriter. Where, however, a ship soon after sailing founders or becomes disabled, and this cannot be ascribed to any violent storm or other adequate cause, there is a presumption of fact that it arose from unseaworthiness at the commencement of the voyage, and the burden of proof is then shifted to the assured (*d*).

(ii.) *Of Legality.*

Implied warranty of legality.

842. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner (*e*).

(*s*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 40 (1). This provision is in accordance with the decision in *Koebel* v. *Saunders* (1864), 17 C. B. (N. S.) 71; but of course the underwriter is not liable for a loss directly resulting from the inherent defect or vice of the goods; as to this see p. 433, *post*.

(*t*) *Lane* v. *Nixon* (1866), L. R. 1 C. P. 412.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 39 (5). This provision is in accordance with the decision of the House of Lords in *Gibson* v. *Small* (1853), 4 H. L. Cas. 353, and *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284. American law on this subject differs from English law, see Arnould on Marine Insurance, s. 709.

(*b*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 39 (5). *Thompson* v. *Hopper* (1858), E. B. & E. 1038, Ex. Ch.; *Dudgeon* v. *Pembroke*, *supra*. See, further, p. 435, *post*.

(*c*) The question is discussed in Arnould on Marine Insurance, s. 696, where the English and foreign authorities on both sides are cited. The English authorities are *Fawkes* v. *Lamb* (1862), 31 L. J. (Q. B.) 98; *Burges* v. *Wickham* (1863), 3 B. & S. 669, 685, 697; *Clapham* v. *Langton* (1864), 34 L. J. (Q. B.) 46, Ex. Ch.

(*d*) *Parker* v. *Potts* (1815), 3 Dow, 23, H. L.; *Davidson* v. *Burnand* (1868), L. R. 4 C. P. 117; *Pickup* v. *Thames Insurance Co.* (1878), 3 Q. B. D. 594, C. A.; *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.*, *Hajee Cassim Joosab* v. *Ajum Goolam Hossen & Co.*, [1901] A. C. 362, P. C., approving *Anderson* v. *Morice* (1874), L. R. 10 C. P. 58, 68; affirmed on this point (1875), L. R. 10 C. P. 609, Ex. Ch.; (1876), 1 App. Cas. 713, without reasons given. See also *Watson* v. *Clark* (1813), 1 Dow, 336, H. L.; *Douglas* v. *Scougall* (1816), 4 Dow, 269, H. L.; *Lindsay* v. *Klein*, [1911] A. C. 194. It has been observed by BRETT, L.J., in *Pickup* v. *Thames Insurance Co.*, *supra*, at p. 601, that the judgments of Lord ELDON, L.C., in the cases in Dow's Reports were on appeal from Scotch judgments where the courts were judges of fact as well as law, and that therefore the presumptions referred to in those judgments were presumptions of fact and not of law (see also *per* THESIGER, L.J., at p. 605, *ibid.*).

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 41.

Illegal insurance generally.

843. An insurance upon an illegal voyage or adventure is itself illegal, for if an original transaction is illegal a contract intended to indemnify against loss in respect of such adventure must evidently also be illegal (*f*).

A contract of marine insurance may be illegal by the common law or statute law, or because the insured adventure is illegal; and the adventure may be illegal either by statute law, or because it is in violation of the common law or the prize law as administered in this country, or in contravention of treaties made by the British Government with other countries, or of proclamations or orders made by the King in Council (*g*).

Insurances by or on behalf of an alien enemy during war.

844. As regards insurances effected by alien enemies, the following propositions have been firmly established by judicial decisions.

Contracts of marine insurance, like other contracts, if entered into with a British subject by or on behalf of an alien enemy during a war with this country, are wholly void and illegal, and cannot be enforced by the assured or his agent (*h*).

Insurances by alien enemy before commencement of war.

On the other hand, insurances, if effected before the outbreak of war by persons who afterwards became alien enemies, are valid and legal contracts, the right of action on which is only suspended during the war and revived upon its close (*i*); but although such insurances are legal contracts, they are, on grounds of public policy, not allowed to cover any losses that occur during the war, and are available only as contracts of indemnity against losses which have occurred before commencement of hostilities (*k*).

(*f*) *Redmond* v. *Smith* (1844), 7 Man. & G. 457, *per* TINDAL, C.J., at p. 474.

(*g*) As to treaties, see *The Eenrom* (1799), 2 Ch. Rob. 1, 6; *Bird* v. *Appleton* (1800), 8 Term Rep. 562, 564: and as to statute law, *Wilson* v. *Marryat* (1798), 8 Term Rep. 31; affirmed *sub nom. Marryat* v. *Wilson* (1799), 1 Bos. & P. 430, Ex. Ch. As to illegal contracts generally, see title CONTRACT, Vol. VII., pp. 390 *et seq.*

(*h*) *The Hoop* (1799), 1 Ch. Rob. 196, 198, 201; *Furtado* v. *Rogers* (1802), 3 Bos. & P. 191, 199, 200; *Esposito* v. *Bowden* (1857), 7 E. & B. 763; and see *Kellner* v. *Le Mesurier* (1803), 4 East, 396; *Gamba* v. *Le Mesurier* (1803), 4 East, 407; *Brandon* v. *Curling* (1803), 4 East, 410; *De Luneville* v. *Phillips* (1806), 2 Bos. & P. (N. R.) 97; and title ALIENS, Vol. I., p. 310. How far these propositions will continue to be law is rendered doubtful by art. 23, clause (h) of the Hague Regulations respecting war on land. On this subject, see Lawrence, Principles of International Law, 4th ed., pp. 358, 359. The question belongs to international law and prize law. At any rate it seems clear that the existing law can be altered only by an Act of Parliament. See title PRIZE LAW AND JURISDICTION.

(*i*) *Furtado* v. *Rogers*, *supra*, at p. 201; *Janson* v. *Driefontein Consolidated Mines, Ltd.* [1902] A. C. 484; *Harmer* v. *Kingston* (1811), 3 Camp. 150; *Flindt* v. *Waters* (1812), 15 East, 260; and see *Boulton* v. *Dobree* (1808), 2 Camp. 163; *Shepeler* v. *Durant* (1854), 14 C. B. 582; and title ALIENS, Vol. I., p. 310.

(*k*) *Brandon* v. *Curling*, *supra*, *per* Lord ELLENBOROUGH, C.J., at p. 417; *Gamba* v. *Le Mesurier*, *supra*; *Kellner* v. *Mesurier*, *supra* (loss by British capture); *Janson* v. *Driefontein Consolidated Mines, Ltd.*, *supra*, at pp. 493, 499, 508. In the last case the question incidentally arose whether the action on the policy could be brought during the war in case the defendant raised no objection; VAUGHAN WILLIAMS, L.J., [1901] 2 K. B. 419, C. A., and Lord DAVEY, in the House of Lords, stated in their opinion it could not, but in this opinion Lord LINDLEY did not concur. See *Harmer* v. *Kingston*, *supra*; *Flindt* v. *Waters*, *supra*; *Alcinous* v. *Nigreu* (1854), 4 E. & B. 217; *Shepeler* v. *Durant*, *supra*.

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The fact, however, that war is expected and imminent will not free the insurer from liability for loss of property by seizure, even if it be seized by a government for the purposes of a war which it is on the point of declaring, and even though the insurance was intended to protect the property against such seizure (*l*).

Insurance on property liable to British capture.

As a general rule, whenever any property is according to prize law as administered by the courts of this country liable to British capture, the insurance in this country on such property is illegal and void. It may be liable to British capture on many various grounds—for instance, because it is enemy's property, or contraband carried to a hostile country, or because the ship is employed in violation of the law of blockade by the British Government or its allies, or is engaged in carrying enemy's troops, or in any other manner which is considered by the prize law of this country to be illicit or illegal.

Civil domicil determines nationality.

845. It is important to notice that the civil domicil, and for commercial purposes the commercial domicil, and not the domicil of origin, determines a person's national character (*m*); and further that the rules relating to the transfer of property during or in contemplation of war differ materially in many respects from those which govern the rights of parties in peace (*n*).

Policy is not illegal because it covers an adventure in contravention of foreign revenue laws.

846. The courts of this country do not in any way protect the revenue laws of a foreign country, and, therefore, insurances effected in this country are not illegal merely because they cover voyages or adventures which those laws would prohibit (*o*). This fact, however, may, of course, be a material circumstance which the assured is bound to disclose to the underwriter.

Nor because it protects an adventure in violation of a foreign belligerent's rights.

847. Neutrals, whether British subjects or foreigners, are by our law entitled to carry on their trade with a belligerent, subject to the belligerent's right of capture, hence it follows that the carriage of contraband goods, and voyages in breach of blockade, are not illegal, and that insurances on such goods or voyages are valid (*p*).

(*l*) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484; see *ibid.*, *per* Lord HALSBURY, L.C., at pp. 491 *et seq.*

(*m*) See title CONFLICT OF LAWS, Vol. VI., pp. 182 *et seq.*, 195.

(*n*) All such questions as to who is an alien enemy and what is enemy's property, what property is contraband or otherwise liable to British capture, are questions determined by the common law and prize law of this country, and do not belong to the subject of insurance law. See hereon titles ALIENS, Vol. I., p. 310; PRIZE LAW AND JURISDICTION. To this subject belongs the discussion to what extent the prize law has been modified by the conventions come to at the Hague Conference of 1907, and how far it is likely to be altered by the Declaration of London, 1909. As to licences to trade with enemies, see title ALIENS, Vol. I., p. 311. A licence was held to be unnecessary in *Johnson* v. *Greaves* (1810), 2 Taunt. 344; *Blackburn* v. *Thompson* (1811), 3 Camp. 61.

(*o*) *Planché* v. *Fletcher* (1779), 1 Doug. (K. B.) 251. The question whether an insurance which is effected in a foreign country, and is there illegal and prohibited, is void in this country is a question which has not yet been definitely decided. See *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, C. A.; *Fracis, Times & Co.* v. *Sea Insurance* (1898), 3 Com. Cas. 229, 236; compare *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega*, [1901] 2 K. B. 567, 574; affirmed, [1902] 2 K. B. 384, 393, C. A. (insurance effected abroad illegal by English law); see title CONFLICT OF LAWS, Vol. VI., p. 238.

(*p*) *Re Grazebrook, Ex parte Chavasse* (1865), 34 L. J. (BCY.) 17; *The*

848. A policy may be illegal because the insured adventure contravenes the laws of revenue, navigation or any other municipal law of this country; and whether a statute renders a voyage illegal, or is only intended to impose a penalty on the owner, master, or other person violating it, is a question of construction (*q*).

Policies in violation of statute.

849. Where the adventure which is the subject of the insurance, is not in itself unlawful, the fact that in the course of the insured voyage British law relating to revenue or navigation is contravened, does not make the insurance illegal, unless the insured himself was a party to the illegality or could control the matter involving the illegality (*r*); and an authority from the owner to the master of the ship to do an illegal act will not be implied from the general powers of the latter (*s*). Thus, if a master of a vessel which has not obtained a certificate required by the statute to carry passengers, carries them without her owner's knowledge, the policy effected by the latter is not vitiated on the ground of illegality (*t*).

Cases when illegal act does not avoid a policy.

Moreover, although it was the intention of the parties at the time of entering into the contract that it should be carried out in a manner which is in fact prohibited by law, yet if both parties were ignorant of the prohibition, and, if the contract can be and is ultimately carried out without violating the law, the contract is not void (*u*).

How far illegality of part of voyage affects the insured voyage.

850. Difficult questions have arisen as to whether the illegality of part of a voyage renders the insurance of other parts of it illegal. The result of the cases, so far as they can be reconciled with each other, seems to be (1) that any illegality in the prior stages, or at the outset, of an integral voyage vitiates a policy, though effected only to protect some later stage of it in which there is no illegality; (2) that an illegality in any part of an entire risk or voyage insured vitiates the insurance as to the whole of it; (3) that the illegality of a wholly distinct and separate voyage has no effect on the voyage insured by the policy (*a*).

Helen (1865), L. R. 1 A. & E. 1; *Caine* v. *Palace Steam Shipping Co.*, [1907] 1 K. B. 670, C. A., *per* FARWELL, L.J., at p. 679. *Harratt* v. *Wise* (1829), 9 B. & C. 712; and *Naylor* v. *Taylor* (1829), 9 B. & C. 718, though assumed to be so in *Medeiros* v. *Hill* (1832), 8 Bing. 231, 234, are not authorities to the contrary. See *The Helen*, *supra*, at p. 7; and title ALIENS, Vol. I., p. 311.

(*q*) *Atkinson* v. *Abbott* (1809), 11 East, 135, *per* Lord ELLENBOROUGH, C.J., at p. 141; *Redmond* v. *Smith* (1844), 2 Dow. & L. 280; and see *Smith* v. *Mawhood* (1845), 14 M. & W. 452; *Cunard* v. *Hyde* (1859), 2 E. & E. 1; and other cases cited in title CONTRACT, Vol. VII., p. 402.

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 41; *Farmer* v. *Legg* (1797), 7 Term Rep. 186; *Cunard* v. *Hyde*, *supra*.

(*s*) *Dudgeon* v. *Pembroke* (1874), L. R. 9 Q. B. 581; affirmed after reversal (1875), 1 Q. B. D. 96, Ex. Ch.; (1877) 2 App. Cas. 284 (but no appeal on this point); *Carstairs* v. *Allnutt* (1813), 3 Camp. 497; *Metcalfe* v. *Parry* (1814), 4 Camp. 123; *Cunard* v. *Hyde* (1858), E. B. & E. 670; *Hobbs* v. *Henning* (1864), 17 C. B. (N. S.) 791, 821; *Wilson* v. *Rankin* (1865), L. R. 1 Q. B. 162.

(*t*) *Dudgeon* v. *Pembroke*, *supra*; *Australasian Insurance Co.* v. *Jackson* (1875), 33 L. T. 286, P. C. (breach by master of Pacific Islanders Protection Act, 1872 (35 & 36 Vict. c. 19)). As to such certificate, see title SHIPPING AND NAVIGATION.

(*u*) *Waugh* v. *Morris* (1873), L. R. 8 Q. B. 202.

(*a*) See Arnould on Marine Insurance, s. 739; *Wilson* v. *Marryat* (1798), 8

SECT. 11. Avoidance of Policies and Warranties.

Whether the voyage insured is to be considered a distinct and separate voyage or only part of a larger voyage is a question depending mainly on the contract of affreightment and the circumstances under which it was made (*b*).

Some of the decisions above referred to (*b*) are difficult to reconcile with each other (*c*), and some seem inconsistent with the provisions of the Act (*d*). It is submitted that in these circumstances the courts of this country are likely to follow the canon of construction which applies to a consolidating statute in common with other instruments, and to give effect to the natural meaning of the enactment (*e*). If this view be correct the illegality of a policy will be generally determined by only two considerations, first, whether the adventure insured is a lawful one; and, second, whether the assured was in a position to control the matter involved in the illegality.

Illegality of policy may not be received.

851. If a policy is illegal, its illegality cannot be waived by either party, and the court is bound to declare the policy void as soon as the illegality is disclosed (*f*).

SECT. 12.—*Perils Insured Against.*

SUB-SECT. 1.—*Perils of the Seas.*

Clause enumerating the perils insured against.

852. The clause in Lloyd's policy which enumerates the adventures and perils insured against is that numbered 10 in the form already given (*g*), and most English policies contain the same words.

The Marine Insurance Act, 1906.

With regard to this subject the Act (*h*) provides that:—

(1) Subject to its provisions, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular (a) the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew; (b) unless the policy otherwise provides, the insurer on

Term Rep. 31, *per* Lord KENYON, C.J., at p. 46; affirmed, *Marryat* v. *Wilson* (1799), 1 Bos. & P. 430, Ex. Ch., but without touching this point; *Bird* v. *Pigou* (1800), 2 Selwyn, Law of Nisi Prius, 13th ed., p. 932; *Bird* v. *Appleton* (1800), 8 Term Rep. 562; *Sewell* v. *Royal Exchange Assurance Co.* (1813), 4 Taunt. 856.

(*b*) See cases cited in note (*a*), p. 431, *ante*.

(*c*) 1 Phillips, Law of Insurance, s. 231.

(*d*) *I.e.*, Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 41; see p. 428, *ante*.

(*e*) See title STATUTES.

(*f*) *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214, 220 (p. p. i. policy). It may be worth notice that the word "warranty" in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 41, seems to be used in a somewhat inaccurate manner, for although an implied warranty can be waived, the illegality of a policy cannot be waived by either party.

(*g*) See note (*p*), p. 340, *ante*.

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55.

ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against; (c) unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils (*i*).

Meaning of "perils of the seas."

853. The term "perils of the seas" does not include every casualty which may happen to the subject-matter of the insurance on the sea; it must be a peril of or due to the sea. It does not, for instance, cover fire or capture at sea, nor any loss proximately caused by rats, insects, or other vermin, nor any injury to machinery not proximately caused by maritime perils (*k*). Again, unless the policy otherwise provides, it will not cover damage done by the bursting of the air-chamber of a donkey-engine, owing to a valve being closed which ought to be kept open, whereby water is forced up into the air-chamber and causes an explosion (*l*).

"Perils of the seas" imply something that is fortuitous.

Moreover, the purpose of a marine policy is to secure an indemnity against accidents which may happen, not against events which in the ordinary course of things must happen (*m*). Therefore, speaking generally, the term "perils of the seas" refers only to fortuitous accidents or casualties of the sea, and does not include the ordinary action of the winds and waves (*n*).

Damages in ordinary course of employment.

854. For the same reason the insurer is not liable for damage done by stranding in the ordinary course of the ship's employment, nor for ordinary wear and tear, ordinary leakage and breakage, or inherent vice or nature of the subject-matter insured (*o*).

Stranding.

If the ship takes the ground in the usual course of her voyage and without the intervention of any extraordinary casualty, this is mere wear and tear; to make the underwriters liable there must be something fortuitous, accidental, and not necessarily arising from the ordinary course of navigation (*p*). Moreover, a loss by

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55.

(*k*) *Ibid.*, s. 55 (2) (c); *Schloss Brothers* v. *Stevens*, [1906] 2 K. B. 655, *per* WALTON, J., at p. 670.

(*l*) *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484; compare *Oceanic Steamship Co.* v. *Faber* (1907), 13 Com. Cas. 28, C. A.; see also *Yuill & Co.* v. *Scott Robson*, [1907] 1 K. B. 685; affirmed, [1908] 1 K. B. 270, C. A.

(*m*) *Merchants Trading Co.* v. *Universal Marine Co.* (1870), *per* LUSH, J., cited in L. R. 9 Q. B. 596; *Wilson, Sons & Co.* v. "*Xantho*" (*Owners of Cargo*) (1887), 12 App. Cas. 503, *per* Lord HERSCHELL, at p. 509.

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 7; see *Magnus* v. *Buttemer* (1852), 11 C. B. 876, *per* JERVIS, C.J., at p. 881; *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518, *per* Lord HALSBURY, L.C., at p. 524; and the judgment of WALTON, J., in *Schloss Brothers* v. *Stevens*, *supra*.

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55 (2) (c).

(*p*) *Magnus* v. *Buttemer* (1852), 11 C. B. 876. A policy against liability for loss of a vessel by "grounding or stranding" does not cover sinking to the ground in deep water (*Baker-Whiteley Coal Co.* v. *Marten* (1910), 26 T. L. R. 314).

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stranding can only take place when the ship, if not on the seas, is at any rate waterborne (*q*).

"Wear and tear."

855. Loss by the wear and tear of a ship and its appurtenances (*r*) differs essentially from a loss by peril of the sea in this respect, that it is not due to any fortuitous casualty, but to the ordinary result of navigation. Thus the parting of a rope or cable, the splitting of a sail in ordinary weather, damage done to the vessel's copper sheathing or to the cable and anchor in a place of usual anchorage and in no extraordinary circumstances of wind and weather, decay of, or damage to, masts or spars in the ordinary service of the ship, are all cases of wear and tear for which the underwriter is not liable (*s*).

Similarly damage caused by the ship springing a leak is considered wear and tear, unless it be traceable to some fortuitous occurrence during the voyage (*t*).

"Leakage or breakage."

856. As regards leakage or breakage of goods, underwriters are liable only when it is caused by the violent pitching or labouring of the ship (*a*), and are not liable for ordinary leakage and breakage such as usually occurs on every voyage.

"Inherent vice or nature."

Of goods.

857. As regards the inherent vice or nature of the subject-matter, unless the policy otherwise provides, the underwriter is not liable for loss or damage that is not the consequence of some casualty which can properly be considered a peril of the sea; he is, therefore, not liable for loss or damage arising solely from decay or corruption of the subject-matter insured, as when fruit becomes rotten or flour heats, not from external causes, but from internal decomposition; nor is he liable for spontaneous combustion

(*q*) *Phillips* v. *Barber* (1821), 5 B. & Ald. 161; *Thompson* v. *Whitmore* (1810), 3 Taunt. 227; *Rowcroft* v. *Dunsmore* (1801), cited 3 Taunt. 228. These two cases, however, are now of little importance, because they were decided under the old rules of pleading, and the losses claimed in them would be covered by the words "all other misfortunes" at the end of the perils clause; see note (*p*), p. 340, *ante*.

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55 (2) (c).

(*s*) In order to avoid disputes as to wear and tear, average adjusters have laid down the following rules:—"Sails split by the wind or blown away while set unless occasioned by the ship grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent, are wear and tear not chargeable to underwriters and similarly as to rigging injured by straining or chafing, unless such injury is caused by blows of the seas, grounding or contact or by displacement through sea perils of the spars, channels, bulwarks or rails." See further, on this subject, McArthur, Contract of Marine Insurance, 2nd ed., pp. 110, 113, 220, 222. In *Harrison* v. *Universal Marine Insurance Co.* (1862), 3 F. & F. 190, a special jury found against the alleged custom not to pay for damage done to the hull below the water line except where the ship had taken the ground or had come into some substance other than water. This finding led to the insertion of the "metalling" clause. See McArthur, Contract of Marine Insurance, 2nd ed., pp. 308, 309.

(*t*) See *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518, *per* Lord HALSBURY, L.C., at pp. 523, 524; *Dudgeon* v. *Pembroke* (1877), L.R. 9 Q. B. 581, 595; affirmed (1877), 2 App. Cas. 284; *Merchants' Trading Co.* v. *Universal Marine Insurance Co.* (1870), 2 Asp. M. L. C. 431, n., there cited by BLACKBURN, J.

(*a*) *Crofts* v. *Marshall* (1836), 7 C. & P. 597.

generated by some chemical change in the thing insured, arising from its being put on board in a wet or otherwise damaged condition (*b*).

Where the insurance is on living animals the underwriters are not liable for losses solely attributable to death from natural causes, for they only undertake to indemnify against losses proximately caused by the immediate agency of the perils insured against (*c*), and death from natural causes is not a peril insured against.

Loss by mortality is, however, sometimes expressly included amongst the perils insured against (*d*).

"Inherent vice" of ship.

858. The exception of inherent vice applies to damage to the ship as well as to the goods. Thus, if a ship insured under a time policy starts on the voyage in an unseaworthy condition, and is by reason of such unseaworthiness, and not by the perils of the seas, obliged to put into a port for repair, the expenses of doing so cannot be recovered from the underwriter, although there is no warranty of seaworthiness, even if the owner was not aware of the vessel being unseaworthy (*e*). On the other hand, the underwriters on a time policy will be liable if the perils of the seas are the proximate cause of the ship putting into port, or of her being lost, although this would not have occurred but for the ship's unseaworthiness, provided the assured was not privy to this (*f*).

Loss proximately caused by delay.

859. As already stated (*g*), unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against (*h*). From this it follows that the underwriter is not liable

(*b*) *Boyd* v. *Dubois* (1811), 3 Camp. 133.

(*c*) For early cases about the mortality of negro slaves when death was caused by suicide, mutiny or jettison, see *Gregson* v. *Gilbert* (1783), 1 Park on Marine Insurance, 8th ed., p. 138; *Jones* v. *Schmoll* (1785), 1 Term Rep. 130, n. As to insurances on animals generally and the effect of the clause "free of mortality and jettison," see *Tatham* v. *Hodgson* (1796), 6 Term Rep. 656; *Lawrence* v. *Aberdein* (1821), 5 B. & Ald. 107, 111; *Gabay* v. *Lloyd* (1825), 3 B. & C. 793.

(*d*) *Jacob* v. *Gaviller* (1902), 7 Com. Cas. 116 (which see as to the "walking ashore" clause); *St. Paul Fire and Marine Insurance Co.* v. *Morice* (1906), 11 Com. Cas. 153 (a bull was insured against all risks including mortality, and it was held that mortality meant death from disease or natural hurt, and not violent death caused to the animal on board the vessel after its arrival by reason of local regulations which compelled its slaughter in consequence of the existence of foot-and-mouth disease on board).

(*e*) *Fawcus* v. *Sarsfield* (1856), 6 E. & B. 192, 204; *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455, C. A.

(*f*) *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284, 295. In this case a vessel which was unseaworthy was by the force of the winds and waves driven on shore and finally broke up and went to pieces. It was held in the House of Lords that the underwriters were liable on the time policy because the ship was proximately lost by the perils of the seas. But if with the privity of the assured the ship is sent to sea in an unseaworthy state, the underwriter is not liable for a loss attributable to unseaworthiness (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 39 (5)). See also *ibid.*, s. 55 (2) (a); *Dudgeon* v. *Pembroke*, *supra*; and p. 438, *post*.

(*g*) See p. 433, *ante*.

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55 (2) (b), which embodies

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for damage to perishable goods, although such damage would not have arisen but for the prolongation of the voyage caused by a peril insured against. Similarly the wages of the crew and expenses incurred and provisions consumed during detention, whether in a port of distress for repairs, or by embargo or restraint of princes, are not according to English law, in the absence of a stipulation to the contrary, recoverable from the underwriter (*i*).

There need be no extraordinary violence of wind or waves.

Loss by collision.

Incursion of sea water.

860. Having regard to certain *dicta* to be found in some judgments and to the wording of the rule in the First Schedule to the Act (*k*), it is important to notice that losses by perils of the seas are not confined to those occasioned by extraordinary violence of the wind or waves, but include all losses proximately occasioned by fortuitous action of the wind and waves. Thus, they include a loss by collision with another vessel, or by the ship striking on a sunken rock or other obstruction in fair weather, or damage done to cargo by incursion of sea water through a hole in a pipe gnawed by rats (*l*), or through a valve by mistake left open (*m*).

Foundering of ship.

Missing ship.

861. One of the most obvious cases of loss by perils of the seas is the foundering of the ship at sea, and where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed (*n*). It is also presumed that the cause of loss is foundering at sea (*o*). These presumptions are, however, only presumptions of fact depending upon the circumstances of each

the principle laid down in the following cases:—*Taylor* v. *Dunbar* (1869), L. R. 4 C. P. 206 (the loss of meat necessarily thrown overboard in consequence of putrefaction due solely to delay occasioned by tempestuous weather is not a loss by perils of the seas, nor within the general clause "all other losses etc.," see note (*p*), p. 340, *ante*); *Pink* v. *Fleming* (1890), 25 Q. B. D. 396, C. A. (damage to fruit caused partly by the delay, and partly by the handling occasioned by putting into port, and discharging and reshipping the cargo, in order to effect repairs to the ship rendered necessary by collision, is not "damage consequent on collision" within the meaning of a policy covering that risk). *Pink* v. *Fleming*, *supra*, is explained in *Schloss Brothers* v. *Stevens*, [1906] 2 K. B. 665. In the latter case it was held by WALTON, J., that an insurance against "all risks by land and by water" covers all losses of an accidental nature of whatever kind.

(*i*) *Fletcher* v. *Poole* (1769), 1 Park on Marine Insurance, 8th ed., p. 115; *Lateward* v. *Curling* (1776), 1 Park on Marine Insurance, 8th ed., p. 288; *Eden* v. *Poole* (1785), 1 Park on Marine Insurance, 8th ed., p. 117; *Robertson* v. *Ewer* (1786), 1 Term Rep. 127; compare *M'Carthy* v. *Abel* (1804), 5 East, 388; *Everth* v. *Smith* (1814), 2 M. & S. 278 (policies on freight). See also *Wilson* v. *Bank of Victoria* (1867), L. R. 2 Q. B. 203, *per* BLACKBURN, J., at p. 212.

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 7.

(*l*) *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518; *Popham* v. *St. Petersburg Insurance Co.* (1904), 10 Com. Cas. 31 (where unusual obstruction by ice was held a peril insured against and the plaintiffs were held entitled to recover the landing, warehousing and forwarding charges thereby occasioned).

(*m*) *Blackburn* v. *Liverpool, Brazil and River Plate Steam Navigation Co.*, [1902] 1 K. B. 290; compare *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.*, *Hajee Cassim Joosub* v. *Ajum Goolam Hossen & Co.*, [1901] A. C. 362, P. C.

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 58.

(*o*) *Green* v. *Brown* (1743), 2 Stra. 1199; *Newby* v. *Read* (1761), Marshall on Marine Insurance, 4th ed., 388; *Koster* v. *Reed* (1826), 6 B. & C. 19.

particular case (*p*); and in order to lay a foundation for any such presumption there must be evidence leading to the inference that the ship when she left her port of departure was bound for and sailed on the voyage insured (*q*).

SUB-SECT. 2.—*Regard must be had to the Proximate Cause of the Loss.*

(i.) *Negligence as remote Cause immaterial; Effect of Wilful Misconduct.*

Causa proxima non remota spectatur.

862. It is a fundamental principle of marine insurance that the underwriter is liable for no loss which is not proximately caused by the perils insured against (*r*); therefore where there is a succession of causes which have produced the loss, the last cause must be looked to and the others rejected, although the result would not have been produced without them (*s*). Thus the insurer, unless the policy otherwise provides, is liable for any loss proximately caused by a peril insured against, though the loss would not have happened but for the misconduct or negligence of the master or crew, provided always that it does not amount to barratry, which is a peril expressly specified in the policy (*t*). So, damage to cargo by sea water occasioned whilst the vessel is loading in port by the negligence of the crew in leaving open some valves in the machinery is a loss by perils of the seas for which the underwriter is liable (*a*).

If, however, the original cause of a loss does not cease to operate,

(*p*) *Houstman* v. *Thornton* (1816), Holt (N. P.), 242.

(*q*) *Cohen* v. *Hinckley* (1809), 2 Camp. 51; *Koster* v. *Innes* (1825), Ry. & M. 333; *Koster* v. *Reed* (1826), 6 B. & C. 19.

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55 (1). The leading case on this subject is *Ionides* v. *Universal Marine Assurance* (1863), 14 C. B. (N. S.) 259, known as the *Cape Hatteras Case*, where there was a policy on goods from Rio to New York "warranted free from capture, seizure and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots or commotions." It was held that the underwriters were liable for a loss by perils of the seas, although the ship grounded and was wrecked during the American Civil War in consequence of the light on Cape Hatteras having been put out by the order of the Confederate Government on purpose to destroy the shipping of the Northern States. This case was followed in *Marsden* v. *City and County Assurance Co.* (1866), L. R. 1 C. P. 232 (plate glass policy). As to the meaning of "consequence," see also *Nickels & Co.* v. *London and Provincial Marine and General Insurance Co.* (1900), 6 Com. Cas. 15; *Robinson Gold Mining Co.* v *Alliance Insurance Co.*, [1902] 2 K. B. 489, C. A., *per* COLLINS, M.R., at p. 500; affirmed, without discussing this point, [1904] A. C. 359; *Andersen* v. *Marten*, [1907] 2 K. B. 248, 252, 255; [1908] 1 K. B. 601, C. A.; affirmed on other points, [1908] A. C. 334.

(*s*) See also Lord ELLENBOROUGH's judgment in *Livie* v. *Janson* (1810), 12 East, 648.

(*t*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55 (2) (a); *Busk* v. *Royal Exchange Assurance Co.* (1818), 2 B. & Ald. 73 (fire occasioned by negligence of crew). For further illustrations of the same proposition, see *Walker* v. *Maitland* (1821), 5 B. & Ald. 171; *Bishop* v. *Pentland* (1827), 7 B. & C. 219; *Holdsworth* v. *Wise* (1828), 7 B. & C. 794; *Shore* v. *Bentall* (1828), 7 B. & C. 798, n.; *Phillips* v. *Headlam* (1831), 2 B. & Ad. 380; *Sadler* v. *Dixon* (1841), 8 M. & W. 895, Ex. Ch.; *Redman* v. *Wilson* (1845), 14 M. & W. 476; *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.*, *Trinder, Anderson & Co.* v. *North Queensland Insurance Co.*, *Trinder, Anderson & Co.* v. *Weston, Crocker & Co.*, [1898] 2 Q. B. 114, C. A.

(*a*) *Davidson* v. *Burnand* (1868), L. R. 4 C. P. 117.

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it may still be the proximate cause of the loss although followed by other causes contributing to it (*b*).

Underwriter liable though loss be the result of the negligence of the assured.

863. Even though the loss of or damage to the subject-matter insured be primarily induced by the negligence of the assured himself, the underwriter is liable if it is proximately caused by a peril insured against, unless it be attributable to the wilful misconduct of the assured (*c*). Thus, if the loss be occasioned by the negligence of the master in directing her navigation, the underwriter would be liable although the master be the sole owner of the ship (*d*).

Unless loss caused intentionally.

On the other hand, the underwriter is not liable if the owner of the ship intentionally caused her to be lost by scuttling her or otherwise; nor can the assured recover under a time policy if the ship was sent to sea with his privity in an unseaworthy condition, and the loss is attributable to her unseaworthiness (*e*).

(ii.) *Underwriters not Liable for Act or Election of the Assured or his Agents.*

Sale or hypothecation for repairs.

864. The underwriter is not liable for a loss which is not proximately caused by a peril insured against. Thus, a loss on sale of goods to defray expenses of repair in a port of distress is not a loss by perils of the seas (*f*), nor is a loss by hypothecation of cargo for the purposes of the ship, because in these cases the loss is proximately occasioned not by the perils insured against, but by the shipowner being in want of funds (*g*).

Loss by reason of interdiction of trade or blockade.

865. For similar reasons, neither compliance with an interdiction of commerce with the port of destination (*h*), nor abandonment of the adventure in consequence of the blockade of

(*b*) *Reischer* v. *Borwick*, [1894] 2 Q. B. 548, C. A.; *Montoya* v. *London Assurance Co.* (1851), 6 Exch. 451; *Heyman* v. *Parish* (1809), 2 Camp. 149; *Arcangelo* v. *Thompson* (1811), 2 Camp. 620; *Livie* v. *Janson* (1810), 12 East, 648; *Andersen* v. *Marten*, [1908] A. C. 334 (loss by capture, followed by shipwreck).

(*c*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55 (2) (a); *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.*, *Trinder, Anderson & Co.* v. *North Queensland Insurance Co.*, *Trinder, Anderson & Co.* v. *Weston, Crocker & Co.*, [1898] 2 Q. B. 114, C. A.; *Thompson* v. *Hopper* (1858), E. B. & E. 1038, Ex. Ch., where in the judgments of BRAMWELL, B., and WILLES, J., the maxim *dolus circuitu non purgatur* is fully explained.

(*d*) *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.*, *Trinder, Anderson & Co.* v. *North Queensland Insurance Co.*, *Trinder, Anderson & Co.* v. *Weston, Crocker & Co.*, *supra*.

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 39 (5), 55 (2) (a). See *Thompson* v. *Hopper* (1856), 6 E. & B. 937; and S. C. (1858), E. B. & E. 1038, 1042, Ex. Ch., where the judgment below was reversed. Of course, if the policy was a voyage policy the assured would be precluded from recovering in all cases where the ship was unseaworthy at the commencement of the voyage. At one time it was held that in all questions arising between the subjects of different States, each is a party to the public acts of his own Government, and that therefore an assured could not recover in respect of a capture, arrest or embargo by his own Government (*Conway* v. *Gray*, *Conway* v. *Forbes*, *Maury* v. *Sheddon* (1809), 10 East, 536, 545). But the contrary has now been decided; see *Aubert* v. *Gray* (1862), 3 B. & S. 163, 169, Ex. Ch. See also *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484.

(*f*) *Powell* v. *Gudgeon* (1816), 5 M. & S. 431; *Sarquy* v. *Hobson* (1827), 4 Bing. 131, Ex. Ch.

(*g*) *Greer* v. *Poole* (1880), 5 Q. B. D. 272.

(*h*) *Hadkinson* v. *Robinson* (1803), 3 Bos. & P. 388.

such port (*i*), or of an embargo imposed there (*k*), or of the imminent danger of capture or seizure (*l*), constitutes a risk for which underwriters to an English policy on ship or goods are liable. Although these causes prevent the completion of the insured voyage, the loss of voyage and the expenses thereby occasioned are not considered to be caused by an "arrest, restraint, and detainment," nor by any other peril insured against, because they do not act directly and immediately, but only circuitously, on the subject-matter insured (*m*). On this point our law differs from that which prevails on the Continent of Europe.

Detention.

On the other hand, where an insured voyage is interrupted directly and immediately by the act or intervention of a Government, this constitutes a "restraint of princes or people" within the meaning of the policy, so that if the insured goods be thereby prevented from being forwarded to their ultimate destination, and the detention appear likely to last for an indefinite time, the assured will be entitled to recover for a constructive total loss of the property (*n*).

Loss of freight by the act or election of the assured is not a loss by perils insured against.

866. The same principle is strikingly illustrated in the case of a policy on freight. Thus, where the loss of freight is due to the ship being abandoned by the assured to the underwriter on ship after a constructive total loss, this is deemed to be a loss occasioned by the act and election of the assured and not by a peril of the sea (*o*).

Again, where there is a charterparty by which the ship is chartered on monthly hire, and there is a loss of freight owing to the exercise by the charterer of special rights under the charterparty, such loss is considered as caused by the act of the charterer and not proximately by a peril of the sea, and the underwriter is not liable for it (*p*). Similarly, if the charterparty

(*i*) *Lubbock* v. *Rowcroft* (1803), 5 Esp. 50.

(*k*) *Forster* v. *Christie* (1809), 11 East, 205; *Blackenhagen* v. *London Assurance Co.* (1808), 1 Camp. 454.

(*l*) *Nickels & Co.* v. *London and Provincial Marine and General Insurance Co.* (1900), 6 Com. Cas. 15; compare *Parkin* v. *Tunno* (1809), 11 East, 22. On the general principle, see also *Halhead* v. *Young* (1856), 6 E. & B. 312.

(*m*) The above-mentioned legal principle may of course, like all rules of construction, be avoided by express stipulation in the policy. An insurance on ship is a contract of indemnity against the loss of or damage to the ship herself, and does not indemnify against expenses proximately occasioned by reason of damage done to cargo. See the elaborate judgments in *Field Steamship Co.* v. *Burr*, [1899] 1 Q. B. 579, C. A.

(*n*) *Rodoconachi* v. *Elliott* (1874), L. R. 9 C. P. 518, Ex. Ch.; *Miller* v. *Law Accident Insurance Co.*, [1903] 1 K. B. 712, C. A.; see also *The Knight of St. Michael*, [1898] P. 30.

(*o*) *M'Carthy* v. *Abel* (1804), 5 East, 388; *Scottish Marine Insurance Co. of Glasgow* v. *Turner* (1853), 1 Macq. 334, H. L.; distinguish *United Kingdom Mutual Steamship Assurance Association, Ltd.* v. *Boulton* (1898), 3 Com. Cas. 330; and compare *Mordy* v. *Jones* (1825), 4 B. & C. 394; *Philpott* v. *Swan* (1861), 11 C. B. (N. S.) 270 (proximate cause of loss, selection of distant port for repairs).

(*p*) *Inman Steamship Co.* v. *Bischoff* (1882), 7 App. Cas. 670; *Manchester Liners* v. *British and Foreign Marine Insurance Co.* (1901), 7 Com. Cas. 26; compare *Mercantile Steamship Co.* v. *Tyser* (1881), 7 Q. B. D. 73.

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is for a lump freight, payable on delivery of the cargo, in cash, the underwriter will not be liable to the shipowner for loss of freight if that was really occasioned not by the perils insured against, but by reason of the master having signed bills of lading which did not reserve a general lien on each portion of the cargo for the whole lump freight (*q*). But this principle does not apply to a case where the charterparty provides that freight shall, apart from election by the charterer, automatically cease to be earned, for in such case the loss is considered to be proximately caused by the perils insured against (*r*).

(iii.) *Damages Payable for Collision, not a Loss by Perils of the Sea. The Collision Clause.*

Liability for collision in the absence of collision clause.

867. When two vessels come into collision and it is found that both are to blame, then, according to maritime law as administered by the English Admiralty Court, the damage done to each vessel is added together and is treated as a common loss to be divided equally between the two shipowners (*s*). The result of this division is that in the end the owner of the ship which is the less damaged has to pay a certain balance to the owner of the other vessel. This balance is held by English law not to be recoverable under a policy of marine insurance in the absence of an express stipulation to that effect (*t*). For the same reason, it seems that it would be held that the underwriter would not be liable to pay any sum of money which the shipowner is liable to pay to the owner of another vessel on account of collision (*a*). For this reason it has become the custom for shipowners to protect themselves by a special clause in the policy called the "collision" or "running

The "collision" clause and its effect.

(*q*) *Williams & Co.* v. *Canton Insurance Office, Ltd.*, [1901] A. C. 462.

(*r*) *The Bedouin*, [1894] P. 1, C. A., following and approving *The Alps*, [1893] P. 109. See also *Re Jamieson and Newcastle Steamship Freight Insurance Association*, [1895] 2 Q. B. 90, C. A.; *Jackson* v. *Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125, Ex. Ch. It seems that the second point decided in *Mercantile Steamship Co.* v. *Tyser* (1881), 7 Q. B. D. 73, is overruled by *The Bedouin*, *supra*.

(*s*) Before the Judicature Act, 1873 (36 & 37 Vict. c. 66), conflicting principles were applied by the common law and admiralty courts. The admiralty rule now prevails (*ibid.*, s. 25 (9)). So the owners of cargo on either ship can recover only one-half their damage against the owners of the other ship (*Tongariro* (*Cargo Owners*) v. *Drumlanrig* (*Owners*), *The Drumlanrig*, [1911] A. C. 16, applying *The Milan* (1861), Lush. 388. See title SHIPPING AND NAVIGATION.

(*t*) This was held in *De Vaux* v. *Salvador* (1836), 4 Ad. & El. 420, on the ground that the loss was not "a necessary or proximate effect of the perils of the sea, but growing out of an arbitrary provision of the law of nations." As to the American law on this subject, see *Peters* v. *Warren Insurance Co.*, (1838), 3 Sumner, 389; (1840), 14 Peters, 99 (U.S.A.), and the other authorities cited in the note to Arnould on Marine Insurance, s. 791.

(*a*) As to the amount which a shipowner may be liable to pay to others in consequence of the negligence of his servants causing or contributing to a collision and the limitation of that amount under the provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), see title SHIPPING AND NAVIGATION. A Bill has been introduced in Parliament providing, *inter alia* (pursuant to art. 4 of the International Convention of 23rd September, 1910), for the apportionment, where practicable, of the damage according to the degree of the fault committed by the colliding vessels.

down" clause: this clause takes various forms. One usual clause is the following:—"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of 8*l.* per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of 8*l.* per ton, or, if the value hereby declared amounts to a larger sum, then to such declared value; and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourth parts of the costs thereby incurred or paid; provided also, that this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury to individuals from any cause whatever" (*b*).

As to the expression "the sum which the insured becomes liable to pay, and shall pay," it is important to notice the following point. Where a collision takes place between two vessels for which both are held to blame, the rule, as already stated, is that the damages are added together and each vessel bears one-half of the whole. Thus, if the damage done to vessel A. amounts to £10,000 and to vessel B. £6,000, each vessel is debited with £8,000, being one-half of £16,000. But it has been decided in such a case that it is not correct to say that B. becomes liable to pay A. £5,000, with a cross liability on A. to pay B. £3,000. There is only one liability, and that is a liability on B. to pay A. the difference, £2,000 (*c*). It can be proved without difficulty that the extent to which the underwriter is liable may, in certain cases, especially where the adjustment is complicated by the statutory limitations of liability, materially depend upon whether the principle of a single or cross liability is applied (*d*).

Collision clause applies only to collision between ships.

868. The collision clause above set out is expressed to be applicable in cases of collision between the ship insured and some other vessel. It therefore does not protect the shipowner against liability for his vessel running into a dock wall, breakwater, or anything that is not another ship (*e*). But if there is a collision between

(*b*) For other collision clauses, see McArthur, Contract of Marine Insurance, 2nd ed., p. 314, and Appendix 3 (*ibid.*). As to whether, under a somewhat different clause, the underwriters were liable for damages paid by the assured for loss of life, see *Taylor* v. *Dewar* (1864), 5 B. & S. 58, dissenting from *Coey* v. *Smith* (1860), 22 Dunl. (Ct. of Sess. Cas.) 955.

(*c*) *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (1882), 7 App. Cas. 795 (overruling *Chapman* v. *Royal Netherlands Steam Navigation Co.* (1879), 4 P. D. 157, C. A.); applied, *London Steamship Owners' Insurance Co.* v. *Grampian Steamship Co.* (1889), 24 Q. B. D. 32, 663, C. A.

(*d*) This is worked out in Arnould on Marine Insurance, s. 793, and also in McArthur, Contract of Marine Insurance, 2nd ed., pp. 320 *et seq.*, and Appendix 3 (*ibid.*).

(*e*) This risk is, however, sometimes expressly included (*The Munroe*, [1893] P.

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A.'s tug and B., or if A. strikes upon the anchor of B., this is a collision between two vessels within the meaning of the collision clause (*f*). Moreover, where there has once been a collision within the meaning of the ordinary collision clause, the shipowner will, it seems, be protected against all damages, direct or consequential, occasioned thereby which the owner of the other vessel or cargo may be entitled to recover from him (*g*).

"Full protection" policy.

869. The collision clause, as has been seen, does not apply to every collision nor to every class of damage occasioned by it, nor does it purport to insure against more than three-fourths of the damage sustained. In order to protect themselves against what is not covered by the clause, shipowners often insure in mutual insurance associations, or effect with underwriters a policy which is called a "full protection" policy (*h*).

SUB-SECT. 3.—*Loss by Fire, Capture, Seizure or Takings at Sea, Arrests and Restraint of Princes, Pirates, Thieves, Barratry, and all other Losses, Misfortunes etc.*

Loss by fire.

870. Loss by fire covers fire caused by lightning, or by an enemy, or by the ship being burnt in order to prevent capture (*i*), or from an apprehension of a contagious disease or the like (*k*); and, where a loss of freight is due to steps taken in order to prevent a fire which, but for such steps, would have broken out and destroyed the cargo, the underwriter is liable for such loss of freight (*l*).

Capture and seizure or takings at sea.

871. Capture is a taking by an enemy as prize in time of war with intent to deprive the owner of all property in the thing taken; and if a ship be seized for the purpose of being carried into a port for adjudication, and is afterwards condemned by the prize court, such seizure constitutes an actual total loss (*m*).

248; *Union Marine Insurance Co.* v. *Borwick*, [1895] 2 Q. B. 279). See Arnould on Marine Insurance, s. 795, note (g), as to the Institute clauses which provide for payments made not merely to the owners of the other ship or cargo, but to any other person or persons.

(*f*) *McCowan* v. *Baine, The "Niobe"*, [1891] A. C. 401; *Re Margetts and Ocean Accident and Guarantee Corporation* [1901] 2 K. B. 792; *Chandler* v. *Blogg*, [1898] 1 Q. B. 32.

(*g*) See *The North Britain*, [1894] P. 77, C. A., *per* A. L. SMITH, L.J., at p. 86. In *Burger* v. *Indemnity Mutual Marine Assurance Co.*, [1900] 2 Q. B. 348, C. A., the underwriters' liability was limited to "payments in respect of injury to such other ship or vessel itself," and was held to exclude expenses of removing the wreck of the other vessel, paid by her owners, and recovered from the assured as damages. As to the Institute clauses protecting the underwriters against liabilities for removal of obstructions, see *The North Britain, supra;* approved, *Tatham, Bromage & Co.* v. *Burr, The "Engineer,"* [1898] A. C. 382; *Chapman* v. *Fisher & Sons* (1904), 20 T. L. R. 319.

(*h*) As to this, see Gow, Marine Insurance, p. 254.

(*i*) *Gordon* v. *Rimmington* (1807), 1 Camp. 123.

(*k*) *Ibid.*, at p. 124, n.

(*l*) *The Knight of St. Michael*, [1898] P. 30 (if not a loss by fire it is within the general clause). See p. 446, *post*.

(*m*) *Andersen* v. *Marten*, [1908] A. C. 334. This was an action on a policy against total loss by perils of the seas, "warranted free from capture, seizure,

Seizure includes takings otherwise than by capture, as by revenue or sanitary officers of a foreign State (*n*). Seizures and takings at sea include deprivation of possession, whether the seizure or taking was lawful or unlawful, and whether by enemies or pirates (*o*).

If a British ship be for any reason arrested or seized by the British Government, or if she be detained in port by embargo laid by that Government, this is a detention within the meaning of the policy (*p*).

Arrests, restraints, detainments etc.

872. The words "arrests, restraints, and detainments, of all kings, princes and people of what nation, condition or quality soever," refer to political or executive acts, and do not include a loss caused by riot or by ordinary judicial process (*q*); and by the word "people" is meant not mobs or multitudes of men, but the ruling power of the country, whatever that may be (*r*). A restraint does not necessarily involve the use of actual physical force; any authoritative prohibition on the part of any governing power or the operation of any municipal law is sufficient (*s*).

and detention, and the consequence of hostilities." The insured ship was a neutral ship and was, during the Russo-Japanese War, captured by the Japanese, and while being navigated towards a court of prize was wrecked and became a total loss. She was afterwards condemned in the prize court. It was held that there was a total loss by capture at the time the vessel was seized, though its lawfulness was not authoritatively determined till she was condemned. Where a ship insured against capture only, was driven by stress of weather on the enemy's coast, and then, without having received any material damage by the stranding, was captured by the enemy, this was held to be a loss, not by the perils of the sea, but by capture, and therefore recoverable under the policy (*Green* v. *Elmslie* (1792), Peake, 278 [212]). A policy effected before the commencement of hostilities which insures against capture does not cover British capture (*Kellner* v. *Le Mesurier* (1803), 4 East, 396; *Brandon* v. *Curling* (1803), 4 East, 410). See p. 430, *ante*.

(*n*) *Cory* v. *Burr* (1883), 8 App. Cas. 393; *Miller* v. *Law Accident Insurance Co.*, [1903] 1 K. B. 712, C. A.; *St. Paul Fire and Marine Insurance Co.* v. *Morice* (1906), 11 Com. Cas. 153; compare *Robinson Gold Mining Co.* v. *Alliance Insurance Co.*, [1904] A. C. 359.

(*o*) See *Goss* v. *Withers* (1758), 2 Burr. 683, *per* Lord MANSFIELD, C.J., at p. 694; *Powell* v. *Hyde* (1855), 5 E. & B. 607; *Lozano* v. *Janson* (1859), 2 E. & E. 160 (unlawful seizure); *Kleinwort* v. *Shepard* (1859), 1 E. & E. 447; *Dean* v. *Hornby* (1854), 3 E. & B. 180 (pirates).

(*p*) *Touteng* v. *Hubbard* (1802), 3 Bos. & P. 291, *per* Lord ALVANLEY, C.J., at p. 302; *Green* v. *Young* (1702), 2 Ld. Raym. 840; *Hagedorn* v. *Whitmore* (1816), 1 Stark. 157. In *Lozano* v. *Janson*, *supra*, at p. 176 (see also *Aubert* v. *Gray* (1862), 3 B. & S. 163, 182, Ex. Ch.), it is intimated that the assured cannot recover in respect of a lawful arrest or detention by the British Government; it is submitted that this only meant that if the property insured is liable to arrest or detention by the British Government on account of some illegal act of the assured, and is for that reason arrested or detained, the assured cannot recover.

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 10; *Finlay* v. *Liverpool and Great Western Steamship Co.* (1870), 23 L. T. 251 (legal proceeding).

(*r*) *Nesbitt* v. *Lushington* (1792), 4 Term Rep. 783.

(*s*) *Miller* v. *Law Accident Insurance Co.*, *supra*; compare *Mansell & Co.* v. *Hoade* (1903), 20 T. L. R. 150; *St. Paul Fire and Marine Insurance Co.* v. *Morice*, *supra*, cited in note (*d*), p. 435, *ante* (where a policy "against all risks including mortality" contained the clause "warranted nevertheless free of capture, seizure, and detention, and the consequences thereof," and it was held that even if "mortality" included violent death under

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The essential distinction between capture and arrest is that capture is the forcible taking of the subject-matter of insurance in the time of war with a view to taking it as prize, whereas arrest is a temporary detention only, with a view of ultimately releasing it or repaying its value (*t*).

Pirates.

873. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore (*u*). But revolutionaries organising and carrying out an armed expedition against the Government are not pirates within the meaning of that term in the policy (*a*).

Thieves. Rovers.

The term "thieves" does not cover clandestine theft or a theft committed by any of the ship's company, whether crew or passengers (*b*). But robbery accompanied by violence and committed by strangers, and not by the crew, is a loss by rovers or thieves under the policy (*c*).

Barratry.

874. The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer (*d*), and this is so whether the act of the master be induced by motive of benefit to himself, malice to the owners, or a disregard of those laws which it was his duty to obey, and upon his observance of which his owners relied (*e*).

Sailing out of port without paying port dues or in breach of an embargo, or wilful breach of blockade whereby the ship is seized or other loss is sustained, may be barratry (*f*). If the ship is fraudulently run away with by the captain or by members of the

local regulations for prevention of diseases the underwriters were protected by the warranty).

(*t*) Marshall on Marine Insurance, 4th ed., p. 394; *Barker* v. *Blakes* (1808), 9 East, 283.

(*u*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 8; *Nesbitt* v. *Lushington* (1792), 4 Term Rep. 783, 787; *Palmer* v. *Naylor* (1854), 10 Exch. 382, Ex. Ch. (coolie emigrants piratically and feloniously murdered the captain and part of the crew and carried away the ship and the rest of the crew: it was held that this was an act of piracy, or, at all events, *ejusdem generis*, and covered by the policy); compare *Kleinwort* v. *Shepard* (1859), 1 E. & E. 447).

(*a*) *Bolivia Republic* v. *Indemnity Mutual Marine Assurance Co., Ltd.*, [1909] 1 K. B. 785.

(*b*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 9.

(*c*) *Harford* v. *Maynard* (1785), 1 Park on Marine Insurance, 8th ed., p. 36. If shipwrecked goods are plundered by wreckers on shore, this is a loss by perils of the sea (*Bondrett* v. *Hentigg* (1816), Holt (N. P.), 149), and also, it seems, a loss by rovers and thieves.

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 11.

(*e*) *Earle* v. *Rowcroft* (1806), 8 East, 126, 139; *Heyman* v. *Parish* (1809), 2 Camp. 149. But "wilful default" within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 299 (non-observance of collision regulations; see now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 419 (3)), is not necessarily barratry (*Grill* v. *General Iron Screw Colliery Co.* (1868), L. R. 3 C. P. 476, Ex. Ch.).

(*f*) *Stamma* v. *Brown* (1742), 2 Stra. 1173, 1174, *per* LEE, C.J.; *Robertson* v. *Ewer* (1786), 1 Term Rep. 127, cited by Lord ELLENBOROUGH, C.J., in *Earle* v. *Rowcroft* (1806), 8 East, 126, 139; *Goldschmidt* v. *Whitmore* (1811), 3 Taunt. 508; *Everth* v. *Hannam* (1815), 6 Taunt. 375. For further illustrations, see *Moss* v. *Byrom* (1795), 6 Term Rep. 379 (cruising); *Havelock* v. *Hancill* (1789), 3 Term Rep. 277; *Pipon* v. *Cope* (1808), 1 Camp. 434 (smuggling); *Australasian Insurance Co.* v. *Jackson* (1875), 33 L. T. 286, P. C. (kidnapping).

crew, this is barratry on their part (*g*). Deviation for a fraudulent or criminal purpose is barratry (*h*); but where the act itself, as in cases of deviation, is not on the face of it criminal or fraudulent, the master is not guilty of barratry unless he be proved to have acted criminally or fraudulently with a view to benefit himself or to injure his owner (*i*). Deviation, if barratrous, does not avoid the policy, for the underwriters are liable under it for loss by barratry.

Loss arising from the ignorance or incompetence of the master, through a mistake as to the meaning of his instructions, or as to the best mode of carrying them into effect, does not amount to barratry (*k*).

No act barratrous which is done with the consent of the owners of the ship.

875. No act can be barratrous which is sanctioned or authorised by those who are either the absolute owners of the ship (*l*) or who may be considered her owners for the time being (*m*). Unless he can be so considered, the owner of insured goods cannot recover as for a loss by barratry in respect of any act of the master which is sanctioned by the owner of the ship (*n*). Nor can the owner of a ship recover as for a loss by barratry in respect of acts done by the charterer's agents where the ship is demised to the charterer, and the latter thus becomes owner of the ship for the voyage (*o*).

Loss by barratry seems to be an exception to the general rule of *causa proxima non remota spectatur*, for if there has been barratrous conduct on the part of the master and crew, and the loss happens in consequence thereof, the underwriters are liable as for a loss by barratry although the proximate cause of the loss is a peril of the sea or other peril insured against (*p*).

(*g*) *Falkner* v. *Ritchie* (1814), 2 M. & S. 290; *Brown* v. *Smith* (1813), 1 Dow, 349, H. L.; *Dixon* v. *Reid* (1822), 5 B. & Ald. 597; *Soares* v. *Thornton* (1817), 7 Taunt. 627; *Roscow* v. *Corson* (1819), 8 Taunt. 684; *Hibbert* v. *Martin* (1808), 1 Camp. 538 (barratry by master); *Toulmin* v. *Inglis* (1808), 1 Camp. 421; *Toulmin* v. *Anderson* (1808), 1 Taunt. 227; *Hucks* v. *Thornton* (1815), Holt (N. P.), 30 (barratry of crew in conjunction with prisoners of war).

(*h*) *Vallejo* v. *Wheeler* (1774), 1 Cowp. 143; *Ross* v. *Hunter* (1790), 4 Term Rep. 33. If the captain is compelled by the mutiny of the crew to deviate from his course this is barratry on the part of the mariners (*Elton* v. *Brogden* (1747), as reported in 2 Stra. 1264; and see cases cited in note (*f*), p. 444, *ante*).

(*i*) *Stamma* v. *Brown* (1742), 2 Stra. 1173; *Earle* v. *Rowcroft* (1806), 8 East, 126.

(*k*) *Phyn* v. *Royal Exchange Assurance Co.* (1798), 7 Term Rep. 505; *Todd* v. *Ritchie* (1816), 1 Stark. 240; *Bottomley* v. *Bovill* (1826), 5 B. & C. 210, 212; *Bradford* v. *Levy* (1825), Ry. & M. 331.

(*l*) *Vallejo* v. *Wheeler*, *supra*; *Nutt* v. *Bourdieu* (1786), 1 Term Rep. 323; compare *Stamma* v. *Brown*, *supra*; *Pipon* v. *Cope* (1808), 1 Camp. 434; *Everth* v. *Hannam* (1815), 6 Taunt. 375. But a master who is part owner may be guilty of barratry as against his innocent co-owners (*Jones* v. *Nicholson* (1854), 10 Exch. 28), or against the mortgagee of his share (*Small* v. *United Kingdom Marine Mutual Insurance Association*, [1897] 2 Q. B. 311, C. A.).

(*m*) The question whether the charterer is in any particular case to be deemed the *pro hâc vice* owner of the ship depends upon the terms of the charterparty; see title SHIPPING AND NAVIGATION. Freighters have been so regarded for purposes of barratry in *Vallejo* v. *Wheeler*, *supra*; *Soares* v. *Thornton*, *supra*; *Ionides* v. *Pender* (1872), 1 Asp. M. L. C. 432.

(*n*) *Nutt* v. *Bourdieu*, *supra*; *Stamma* v. *Brown*, *supra*.

(*o*) *Hobbs* v. *Hannam* (1811), 3 Camp. 94.

(*p*) See the judgment in *Cory* v. *Burr* (1881), 8 Q. B. D. 313; (1882), 9 Q. B. D. 463, C. A.; (1883), 8 App. Cas. 393, where, however, Lord BLACKBURN, at p. 398, expressed a contrary opinion, and Lord BRAMWELL, at p. 404, expressed a doubt

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Clause as to all other perils.

876. The general clause by which the underwriters undertake the risk "of all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises and ship etc., or any part thereof," does not in fact comprise all perils. It only comprehends cases of marine damage of a like kind with those specially enumerated and occasioned by similar causes (*q*). It does not include any perils or losses which are not of a marine character nor of a character incident to a ship as such (*r*). Thus where a steamer is loading in harbour and her draught is increased by the weight of the cargo so as to bring the discharge pipe below the surface of the water, and the water flows down the pipe through a valve which has negligently been left open, the damage thereby done to the plaintiff's goods will be covered by the general clause (*s*). But the general clause will not cover the destruction of a steamer caused by the explosion of her boiler, which might take place just as well on land as at sea (*t*).

Other losses.

Other losses which, though not caused by any of the perils enumerated, are recoverable from the underwriter are dealt with elsewhere (*u*).

on this point. It is submitted, however, that Lord BLACKBURN'S view cannot be reconciled with *Earle* v. *Rowcroft* (1806), 8 East, 126, and *Vallejo* v. *Wheeler* (1774), 1 Cowp. 143, and other cases. There are many cases in which a loss may be recovered from the underwriters, either as a loss by barratry, or a loss by perils of the seas, and some of the decided cases involving the question whether the loss was one by barratry or one by perils of the seas have become, on account of the present system of pleading, unimportant (*Heyman* v. *Parish* (1809), 2 Camp. 149; *Arcangelo* v. *Thompson* (1811), 2 Camp. 620; *Goldschmidt* v. *Whitmore* (1811), 3 Taunt. 508; *Everth* v. *Hannam* (1815), 6 Taunt. 375; *Walker* v. *Maitland* (1821), 5 B. & Ald. 171; *Blyth* v. *Shepherd* (1842), 9 M. & W. 763).

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., r. 12. See *Cullen* v. *Butler* (1816), 5 M. & S. 461, *per* Lord ELLENBOROUGH, C.J.; *Butler* v. *Wildman* (1820), 3 B. & Ald. 398; *The Knight of St. Michael*, [1898] P. 30; *Phillips* v. *Barber* (1821), 5 B. & Ald. 161.

(*r*) *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, *per* Lord BRAMWELL, at p. 492.

(*s*) *Davidson* v. *Burnand* (1868), L. R. 4 C. P. 117. In *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* (1880), 6 Q. B. D. 51, C. A., it was held that the destruction of a steamer caused by the explosion of her boiler under the usual pressure of steam was within the general clause either as being a loss due to a peril similar to a peril of the seas, or to a loss by fire, but this view was disapproved of in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co., supra.* In the latter case the air-chamber of the donkey-engine of the steamship *Inchmaree* burst owing to water being forced up into it through a valve being closed which ought to have been left open, and it was held that the damage was not caused by a danger of navigation, or by a peril similar to perils of the seas, because the damage was not of a character to which a marine adventure is specially subject. In consequence of this decision the so-called *Inchmaree* clause is generally inserted in policies on steamships. This clause expressly makes the policy cover loss or damage "through explosions bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager." As to this clause, see *Jackson* v. *Mumford* (1902), 8 Com. Cas. 61; affirmed on other grounds (1904), 9 Com. Cas. 114, C. A.; *Oceanic Steamship Co.* v. *Faber* (1906), 11 Com. Cas. 179, approved (1907), 13 Com. Cas. 28, C. A.; *Hutchins Brothers* v. *Royal Exchange Assurance* (1911), 27 T. L. R. 217 (defective stern frame), affirmed (1911), *Times*, 26th May, C. A., approving the judgment of WALTON, J., in *Oceanic Steamship Co.* v. *Faber, supra;* (1911) 27 T. L. R. 482, C. A.

(*t*) *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co., supra.*

(*u*) These other losses are salvage charges, charges under a suing and

SECT. 13.—*General Average.*

SUB-SECT. 1.—*Statutory Provisions.*

Marine Insurance Act, 1906.

877. A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice (*v*).

There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure (*a*).

Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution (*b*).

SUB-SECT. 2.—*General Average Expenditure.*

General average expenditure.

878. An expenditure caused by or directly consequential on a general average act is called a general average expenditure, for such expenditure may properly be considered as the cost of the general average act. Thus a jettison of goods or the cutting away of a mast in time of peril, in order to save the whole of the property at risk, is a general average sacrifice. If at the time of peril salvors be employed at a certain remuneration to salve the whole of the property at risk (*c*), or if money be paid to pirates for the purpose of saving both ship and cargo, this expenditure constitutes a general average expenditure (*d*). Again, where a vessel puts into a port of refuge for her own safety and that of the cargo on board of her, the inward expenses, including the charges for towage, pilotage, harbour dues etc., are general average expenditure, inasmuch as they are the direct consequences of the general average act of putting into port (*e*).

SUB-SECT. 3.—*Essential Condition of the Right to Contribution in General Average.*

In general.

879. The question what does or does not constitute a general average loss does not directly concern the law of maritime

labouring clause, particular charges (see pp. 455, 456, *post*), substituted charges (see p. 453, *post*), general average charges and contributions (see *infra*).

(*v*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 66 (1).

(*a*) *Ibid.*, s. 66 (2).

(*b*) *Ibid.*, s. 66 (3). These provisions mainly embody the principles laid down by LAWRENCE, J., in *Birkley* v. *Presgrave* (1801), 1 East, 220, 228, and also in the judgments in *Svendsen* v. *Wallace* (1884), 13 Q. B. D. 69, C. A.; affirmed (1885), 10 App. Cas. 404. The law of general average, which owes its origin to the Rhodian laws, was incorporated in the Roman law and afterwards in the common law, and it may therefore now be considered as implied in the contract of affreightment; on this point see the judgment in *Burton* v. *English* (1883), 12 Q. B. D. 218, 223, and *Wright* v. *Marwood* (1881), 7 Q. B. D. 62, C. A.

(*c*) *Ocean Steamship Co.* v. *Anderson* (1883), 13 Q. B. D. 651, C. A.; reversed, without affecting the principle, *sub nom. Anderson* v. *Ocean Steamship Co.* (1884), 10 App. Cas. 107; *Kemp* v. *Halliday* (1866), L. R. 1 Q. B. 520, Ex. Ch.

(*d*) Marshall on Marine Insurance, 4th ed., p. 424.

(*e*) See *Svendsen* v. *Wallace*, *supra*.

SECT. 13. General Average.

insurance, which has only to determine when and to what extent the underwriter is liable in respect of a general average loss or contribution (*f*).

General average loss distinguished from particular average loss.

880. A general average loss differs essentially from a particular average loss. The former is a loss voluntarily incurred for the common safety, and therefore made good by a rateable contribution from all the parties concerned in the adventure, whereas the latter is a loss fortuitously caused by a maritime peril, and has to be borne by the party on whom the loss originally fell (*g*).

When general average ceases.

881. According to the statutory definition (*h*) (and herein English law differs from foreign law) the general average act must be an act done for rescuing the ship and cargo from a common danger, and it is not enough that its object was to insure the successful completion of the adventure. In short, according to English law, as soon as safety is attained, general average ceases. Therefore, speaking generally, any expenditure which is incurred after the ship has been placed in safety must be borne by the owner of the particular interest which it was intended to benefit (*i*).

Losses directly consequent on general average act.

882. Losses which are the direct consequences of a general average act are general average losses. Thus if holes are cut in the ship in order to get goods out for the sake of lightening her, or if water is thrown down a ship's hatches to extinguish an accidental fire, and other goods are damaged thereby, the loss or damage in each case is general average (*j*).

(*f*) For a full discussion of this question, see title SHIPPING AND NAVIGATION. It is sufficient here to notice (see the text, *infra*) some of the more important consequences of the statutory definitions stated on p. 447, *ante*.

(*g*) *Nesbitt* v. *Lushington* (1792), 4 Term Rep. 783. The remuneration paid by the shipowner for all services reasonably necessary for the common safety is a general average expenditure, if they are rendered under circumstances of an extraordinary nature, and at a time when both ship and cargo are alike placed in jeopardy. Thus where a ship has gone ashore, and the shipowner reasonably employs experienced persons to act in his place in the interest of the whole adventure, their remuneration is an expenditure chargeable in general average (*Rose* v. *Bank of Australasia*, [1894] A. C. 687, disapproving *Schuster* v. *Fletcher* (1878), 3 Q. B. D. 418).

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 66 (2); see p. 447, *ante*.

(*i*) *Harrison* v. *Bank of Australasia* (1872), L. R. 7 Exch. 39; *Svensden* v. *Wallace* (1884), 13 Q. B. D. 69, 85 *et seq.*; affirmed (1885), 10 App. Cas. 404. Where a ship is forced to put into a port to repair damage done to her by a storm, and the master, having no other means of raising money, sells (as he is justified in doing) part of the cargo to defray the expenses of repairs, the owner of the cargo sold does not thereby sustain a general average loss (*Powell* v. *Gudgeon* (1816), 5 M. & S. 431; same point in *Sarquy* v. *Hobson* (1827), 4 Bing. 131, Ex. Ch. (accord); *Hallett* v. *Wigram* (1850), 9 C. B. 580; *Dobson* v. *Wilson* (1813), 3 Camp. 480). Whether this be also true where the damage to be repaired is directly occasioned by a general average act, or whether in such case the expenditure may be considered as the direct consequence of the general average act, is a point which must still be considered as open to doubt (*Atwood* v. *Sellar* (1880), 5 Q. B. D. 286, C. A.; *Svendsen* v. *Wallace*, *supra*; and see *Plummer* v. *Wilaman* (1815), 3 M. & S. 482).

(*j*) *Whitecross Wire Co.* v. *Savill* (1882), 8 Q. B. D. 653, C. A.; *Papayanni and Jeromia* v. *Grampian Steamship Co., Ltd.* (1896), 1 Com. Cas. 448.

883. The right of contribution above referred to (*k*) is expressed to be subject to the conditions imposed by the maritime law. One of these is that, where the peril giving rise to the claim has been occasioned by the fault of the claimant or his servant, he himself is precluded from recovering general average contribution. Thus to a shipowner's claim for such contribution, a plea that the loss was caused by the vessel's unseaworthiness is a valid defence (*l*). But this rule bars only the claim of the wrong-doer and not that of other innocent sufferers (*m*).

Right of contribution.

Subject to conditions.

A further condition is that general average contribution is not recoverable in respect of the jettison of goods loaded on deck, unless such loading on deck is in accordance with the common usage of trade on the voyage for which the goods are shipped (*n*).

884. No claim for general average contribution can be sustained unless the sacrifice or expenditure out of which it arises is of an extraordinary nature, or unless the expenditure is directly occasioned by a general average act. The shipowner agrees by the contract of affreightment to give the use of his vessel, with all her appliances, as well as the services of the crew, to the shippers or charterers for the entire voyage. For what he does in performance of that obligation, he has (speaking generally) no right to claim general average contribution. On the other hand, he is not bound to expose the ship or her appliances to the risk of loss or damage by using them in a time of emergency for a purpose for which they were not intended, nor to make an expenditure which is not only extraordinary in amount, but is incurred to procure some service which is extraordinary in its nature (*o*). If, therefore, any part of the ship or her tackle be applied for the common safety to some purpose different from its ordinary use the loss thence arising is a general average loss (*p*), as where the engines of a steamship are damaged whilst being worked ahead or astern in order to get the

Sacrifice or expenditure involved must be extraordinary.

(*k*) See p. 447, *ante;* Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 66 (3).

(*l*) *Schloss* v. *Heriot* (1863), 14 C. B. (N. S.) 59; *The Ettrick* (1881), 6 P. D. 127, 135, 137, C. A.; *Greenshields, Cowie & Co.* v. *Stephens & Sons,* [1908] 1 K. B. 51, 58, 61, C. A.; affirmed, [1908] A. C. 431.

(*m*) *Strang, Steel & Co.* v. *Scott* (*A.*) *& Co.* (1889), 14 App. Cas. 601, P. C.; compare *The Carron Park* (1890), 15 P. D. 203 (negligence of shipowner's servants excepted); *Millburn & Co.* v. *Jamaica Fruit Importing and Trading Co. of London,* [1900] 2 Q. B. 540, C. A.

(*n*) *Wright* v. *Marwood* (1881), 7 Q. B. D. 62, C. A.; *Gould* v. *Oliver* (1837), 4 Bing. (N. C.) 134; *Milward* v. *Hibbert* (1842), 3 Q. B. 120; compare *Royal Exchange Shipping Co.* v. *Dixon* (1886), 12 App. Cas. 11. According to the York-Antwerp Rules (see pp. 508 *et seq., post*), "no jettison of deck cargo shall be made good as general average, and every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel."

(*o*) *Robinson* v. *Price* (1877), 2 Q. B. D. 91, 295, C. A. (use of spars as fuel); *Wilson* v. *Bank of Victoria* (1867), L. R. 2 Q. B. 203, 212 (excessive consumption of coal); *quære,* whether *Wilson* v. *Bank of Victoria, supra,* might not have been decided simply on the ground that the expenditure in question was not the result of a general average act and was incurred at a time when ship and cargo were in a state of physical safety, *quære* also whether some *dicta* of BLACKBURN, J., at p. 212 (*ibid.*), relating to substituted expenses, are consistent with *Lee* v. *Southern Insurance Co.* (1870), L. R. 5 C. P. 397.

(*p*) *Birkley* v. *Presgrave* (1801), 1 East, 220.

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ship off a bank (*q*), or spars are cut up to construct a rudder, or sails and cordage, to stop a leak (*r*).

Putting into port of refuge for repairs.

885. Putting into a port of refuge for repairs which have been rendered necessary by sea perils, for the safety of ship and cargo, is a general average act; and the expense of doing so is a general average expenditure (*s*); but the question as to what part of the expenses incurred is chargeable to general average depends on whether the necessity for repairs itself arose from a general average act, and upon the contract of carriage, or policy of insurance, as the case may be (*t*).

(*q*) *The Bona*, [1895] P. 125, C. A.

(*r*) Phillips, Law of Insurance, s. 1299. See *Harrison* v. *Bank of Australasia* (1872), L. R. 7 Exch. 39, *per* MARTIN, B., at p. 49; *Robinson* v. *Price* (1877), 2 Q. B. D. 91, 295, C. A.

(*s*) Phillips, Law of Insurance, s. 1320; *Svendsen* v. *Wallace* (1884), 13 Q. B. D. 69, C. A., *per* BRETT, M.R., at p. 78; affirmed (1885), 10 App. Cas. 404. See *Hamel* v. *Peninsular and Oriental Steam Navigation Co.*, [1908] 2 K. B. 298.

(*t*) Where a ship is compelled by perils of the seas to put into a port of refuge and expenses are incurred in entering the port, while there, and in leaving it, the practice of the Association of Average Adjusters, in cases where the York-Antwerp Rules (see *infra*) are not incorporated in the policy, is as follows:—(a) When a ship puts into a port of refuge in consequence of damage which is itself the subject of general average, and sails thence with her original cargo, or a part of it, the outward as well as the inward port charges are treated as general average, and when cargo is discharged for the purpose of repairing such damage, the warehouse rent and cost of reloading of the same, as well as the cost of discharge, are treated as general average; (b) when a ship puts into a port of refuge in consequence of damage which is itself the subject of particular average (and not of general average), and when the cargo has been discharged in consequence of such damage, the inward port charges and the cost of discharging the cargo are general average, the warehouse rent of cargo is a particular charge on cargo, and the cost of reloading and outward port charges are a particular charge on freight. Rule (a) is taken from the decision in *Atwood* v. *Sellar* (1880), 5 Q. B. D. 286, C. A. Rule (b) is taken from the decision in *Svendsen* v. *Wallace* (1885), 10 App. Cas. 404. Whether and to what extent these rules strictly accord with the existing law on the subject is a somewhat doubtful question; see title SHIPPING AND NAVIGATION. With a view of bringing about a uniformity of maritime law in all countries, certain rules called the New York and Antwerp Rules, or the York-Antwerp Rules (for which see pp. 508 *et seq.*, *post*), were framed at an International Congress. These rules are very usually incorporated in contracts of affreightment and in policies of insurance, and they have the effect of excluding or modifying to a great extent the rules of the English law relating to general average. Questions as to whether a voluntary stranding gives rise to a general average loss, whether the sacrifice must be successful, and questions as to the property on which contribution is to be levied and as to the mode in which the property sacrificed is to be valued for the purpose of general average adjustment, and many other like questions, belong to the law of shipping and not to that of insurance; see title SHIPPING AND NAVIGATION. In the case of a general ship it is usual for the master, before he delivers the goods, to take a bond from the different consignees to secure the payment of their portions of the average when the same shall be adjusted. As to the practice in these cases, and as to the bond which the master may require before delivery of the goods, see title SHIPPING AND NAVIGATION; *Crooks* v. *Allan* (1879), 5 Q. B. D. 38; *Huth* v. *Lamport* (1886), 16 Q. B. D. 735, C. A.; *Strang, Steel & Co.* v. *Scott (A.) & Co.* (1889), 14 App. Cas. 601, P. C.; *Nobel's Explosives Co., Ltd.* v. *Rea (W. R.)* (1897), 2 Com. Cas. 293.

SUB-SECT. 4.—*Liability of Underwriters in respect of General Average.*

SECT. 13. General Average.

886. The underwriter on a marine policy is liable in respect of a general average loss to the following extent.

Liability of underwriter for :—

(i.) General average expenditure ;

(ii.) General average sacrifice.

Subject to any provision in the policy, where the assured has incurred a general average expenditure he is not entitled to recover from the insurer the whole of the expenditure, but only the proportion of the loss which falls upon him. On the other hand, in the case of a general average sacrifice (as distinguished from general average expenditure) the assured may recover from the insurer the whole amount of the loss, the insurer being subrogated to the rights of the assured in respect of his right of contribution from the other parties liable to contribute (*a*). Thus in the cases of jettison of goods or of cutting away of a mast, the owner of the goods in the one case and the shipowner in the other can recover the full amount of the loss from the underwriter (*b*). But where there is a general average expenditure, for instance, that of putting into a port of refuge, the shipowner is not entitled to recover the whole of it, but only that part which he himself has to bear in respect of his own interest as shipowner (*c*).

(iii.) General average contribution.

Again, subject to any express provision in the policy, when the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer (*d*). Thus if goods are jettisoned, the shipowner who has to pay a general average contribution can recover the amount thereof from his insurer.

But in the absence of express stipulation, the insurer is not liable for any general average loss or contribution, where the loss was not incurred for the purpose of avoiding or in connection with the avoidance of a peril insured against (*e*). Thus if in a marine policy the peril of fire is excepted, damage done by pouring water into the hold of the ship for the purpose of extinguishing a fire that breaks out in her when in dock, though a general average loss, would not be one in respect of which the insurer would be liable (*f*).

SUB-SECT. 5.—*Liability where Ship and Cargo belong to same Person.*

Case where ship and cargo belong to same person.

887. There are certain cases in which the insurer may be liable for general average although the different interests insured do not belong to different parties, and therefore no general average contribution is actually payable. Where ship, freight and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons (*g*). Therefore, if ship and cargo belong to the

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 66 (4); *Dickenson* v. *Jardine* (1868), L. R. 3 C. P. 639.

(*b*) *Dickenson* v. *Jardine*, *supra*.

(*c*) *The Mary Thomas*, [1894] P. 108, C. A.

(*d*) Marine Insurance Act 1906 (6 Edw. 7, c. 41), s. 66 (5).

(*e*) *Ibid.*, s. 66 (6).

(*f*) As to the amount for which underwriters are liable in respect of general average, see further p. 471, *post*.

(*g*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 66 (7), which embodies

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same person, and the thing sacrificed be part of the ship, the assured can sue the underwriter on ship only for the ship's proportion of the loss, and the underwriter on cargo is liable to indemnify him against so much of the loss as is properly attributable to cargo (*h*).

SUB-SECT. 6.—*Place of Adjustment.*

Place of adjustment.

888. The proper place for the adjustment of general average is the ship's port of destination or discharge (*i*). If the adventure be broken up at an intermediate port, either by necessity or by consent of the parties, that port is the proper place for adjusting the general average (*k*), and if the port in which the adjustment is made be a foreign port, such adjustment is called a foreign adjustment. The shipper of goods, inasmuch as he must be taken to assent to general average as a known maritime usage, is, by assenting to it, also deemed to have agreed to its adjustment at the usual and proper place; and such adjustment is conclusive on the parties to the contract of affreightment, both as to the items and as to their apportionment upon the various interests, although it may be different from what our own law would have made if the adjustment had been settled in our own ports (*l*). There is, however, one exception to this general rule; it is where the loss declared by the adjustment to be general average does not arise from any of the perils covered by the policy (*m*).

SUB-SECT. 7.—*Foreign Adjustment Clause.*

Foreign adjustment clause.

889. It has become the regular practice to insert in policies a special clause called the foreign general average clause, by which express provision is made for the contingency of an adjustment being made abroad. This clause was substantially in the following form:—"General average and salvage charges payable as per official foreign adjustment if so made up, or per York-Antwerp Rules if in accordance with the contract of affreightment." The effect of this clause is to make the underwriter liable

the law laid down in *Montgomery & Co.* v. *Indemnity Mutual Marine Insurance Co.*, [1902] 1 K. B. 734, C. A., where the judgment in *The Brigella*, [1893] P. 189, was disapproved.

(*h*) *Montgomery & Co.* v. *Indemnity Mutual Marine Insurance Co.*, *supra*, at p. 741.

(*i*) *Simonds* v. *White* (1824), 2 B. & C. 805.

(*k*) As to what justifies the termination of the voyage at an intermediate port, see *Mavro* v. *Ocean Marine Insurance Co.* (1875), L. R. 10 C. P. 414, Ex. Ch.; *Hill* v. *Wilson* (1879), 4 C. P. D. 329; and see *Fletcher* v. *Alexander* (1868), L. R. 3 C. P. 375, 382.

(*l*) *Simonds* v. *White*, *supra*, at p. 813; *Dalglish* v. *Davidson* (1824), 5 Dow. & Ry. (K. B.) 6; *Mavro* v. *Ocean Marine Insurance Co.*, *supra*.

(*m*) *Harris* v. *Scaramanga* (1872) L. R. 7 C. P. 481, 489, 496; *Newman* v. *Cazalet* (undated), 2 Park on Marine Insurance, 8th ed., p. 900; *Walpole* v. *Ewer* (1789), 2 Park on Marine Insurance, 8th ed., p. 898; *Power* v. *Whitmore* (1815), 4 M. & S. 141. The Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 66 (6), seems to be intended to embody the law laid down in the judgments in *Harris* v. *Scaramanga*, *supra*, to the effect that if a general average loss has been caused by a peril expressly excepted by the policy the underwriters would not be liable in respect thereof, whatever might be the tenor of the foreign adjustment.

in accordance with the foreign adjustment even where the loss declared by such adjustment to be the subject of general average was not incurred in connection with any of the perils covered by the policy (*n*).

It sometimes happens that according to the law of the foreign country the question as to what losses are general average losses is to be determined by the terms of the contract of affreightment. In such case the underwriter on a policy containing the foreign average adjustment clause is bound by the terms of the charter-party although those terms differ from what is the ordinary law of the country to which the port of destination belongs (*o*).

Foreign adjustment binding on assured as well as on insurer.

890. The foreign adjustment, when made in accordance with the law of the foreign port, binds the assured as well as the insurer, and the former cannot recover from the underwriter, as particular average, or otherwise, what the foreign statement has declared to be recoverable as general average by a contribution of the other interests. The assured is not at liberty to approbate and reprobate; he cannot take the benefit of the foreign law and claim general average in accordance with the foreign adjustment, and at the same time repudiate the foreign statement for the purpose of claiming particular average against his insurer; he is bound for all purposes by the foreign statement as to what expenses were incurred on behalf of ship and cargo (*p*).

SUB-SECT. 8.—*Substituted Expenses.*

Substituted expenses.

891. Certain expenses, called "substituted expenses," which are in fact not incurred at all, are allowed in general average or otherwise as if they had been incurred. These are allowed upon the principle that where the assured is in a position to take certain measures for which his insurers would be liable, but instead of doing so adopts more expensive measures for which the latter are not liable, he is entitled to recover from them the amount for which they would have been liable had he chosen to take the less expensive course. For example, where cargo which has been unloaded at a port of refuge instead of being reloaded and carried to its destination in the ship, as it might be, is forwarded by rail at a greater expense, the underwriter on freight, though not

(*n*) *Harris* v. *Scaramanga* (1872), L. R. 7 C. P. 481, 489, 496; and see *Hick* v. *London Assurance* (*Governor & Co.*) (1895), 1 Com. Cas. 244. As to the rule, where the foreign adjustment clause is excluded, see p. 452, *ante*.

(*o*) *De Hart* v. *Compañia Anonima de Seguros* "*Aurora*," [1903] 2 K. B. 503, C. A. On account of this decision a new foreign average adjustment clause, which is as follows, has recently been framed:—"General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or if the contract of affreightment so provides, according to York-Antwerp Rules, or in the case of wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No"); but, in all matters not specifically referred to in York-Antwerp Rules, I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends, and as if the contract of affreightment contained no special terms upon the subject." For the York-Antwerp Rules, see pp. 508 *et seq.*, *post*.

(*p*) *The Mary Thomas*, [1894] P. 108, C. A.

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liable for the entire railway freight, is liable for the amount which it would have cost to reload the cargo in the ship (*q*).

Similarly where a vessel puts into a port of refuge and has to be lightened, if the cargo, in place of being landed and warehoused, is discharged into lighters for storage and is subsequently reshipped, the sum payable for the hire of the lighter is divided between general average, cargo and freight (*r*).

SECT. 14.—*Measure of Loss for which Insurers are Liable.*

SUB-SECT. 1.—*Insurable Value.*

Insurable value.

(i.) Under a valued policy.

892. Under a valued policy, the amount recoverable in respect of a total loss of the subject-matter insured is (not taking into account any sum recoverable under the suing and labouring clause) the amount fixed by the valuation (*s*).

(ii.) Under an unvalued policy.

Under an unvalued policy, the amount recoverable in respect of a total loss is (again not taking into account any sum recoverable under the suing and labouring clause) the value which the subject-matter is deemed to have for the purpose of insurance, and it is called the insurable value (*s*). In policies on ship or goods it is generally assumed that the object of the insurance is to put the assured, in the event of loss, in the same position as he would have occupied if he had never embarked on the insured adventure. But this assumption cannot, from the nature of the case, apply to policies on profits, commissions, freight etc., nor to valued policies on ship or goods.

Marine Insurance Act, 1906.

893. The Act (*t*) provides with respect to insurable value that :—

Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows :—

(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole (*u*) ;

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade (*u*) ;

(*q*) *Lee* v. *Southern Insurance Co.* (1870), L. R. 5 C. P. 397.

(*r*) For the provision in the York-Antwerp Rules on this subject, see p. 509, *post*. As to the amount for which underwriters are liable in respect of general average, see p. 471, *post*.

(*s*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 68. The propositions in the text are of course subject to the provisions of the Act, and to any express provision in the policy (*ibid.*). In fact, the sum recoverable under the suing and labouring clause is never included in the amount recoverable under a loss, whether total or partial, because the claim under that clause is considered to be wholly distinct from the claim in respect of a loss under the policy. See *Lohre* v. *Aitchison* (1878), 3 Q. B. D. 558, C. A., *per* BRETT, L.J., at p. 567; reversed in part, but without affecting the passage cited, *sub nom. Aitchison* v. *Lohre* (1879), 4 App. Cas. 755.

(*t*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 16.

(*u*) *Ibid.*, s. 16 (1). As to what was deemed to be covered by the word "ship" previous to the Act, see *Roddick* v. *Indemnity Mutual Marine Insurance Co.*, [1895] 2 Q. B. 380, 383, C. A.

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(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance (*v*);

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole (*a*);

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance (*b*).

Explanation of the statutory provision.

894. As regards the above provision numbered (1), there seems little doubt but that the term "at the commencement of the risk" means at the commencement of the risk at each stage of the voyage, and that therefore on a policy "at and from" the insurable value of the ship would comprise her outfit, provisions, and stores etc. at the commencement of the voyage, and not merely at the time when the policy attached.

As regards the above provision numbered (3), the prime cost of goods is generally evidenced by the invoice price (*c*).

In all the above provisions the charges of insurance are mentioned, and it is expressly enacted that the assured has an insurable interest in the charges in any insurance he may effect (*d*). The mode in which these charges are insured is as follows:—If the premium of insurance, together with the stamp duties and other charges of insurance, amount to r per cent., and if the loss amount to a sum S, then the total amount required to be insured would be $S \times \frac{100}{100-r}$ (*e*).

SUB-SECT. 2.—*Particular Average; Particular Charges; Salvage Charges; the Suing and Labouring Clause; the Memorandum in the Policy.*

(i.) *Particular Average; Particular Charges; Salvage Charges.*

Particular average.

895. A particular average loss is any partial loss of the subject-matter insured, which is not a general average loss (*f*). Thus if part of the goods be lost, or if the ship be damaged,

(*v*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 16 (2). This was the law previous to the Act (*Forbes* v. *Aspinall* (1811), 13 East, 323, 326; *Palmer* v. *Blackburn* (1822), 1 Bing. 61). In *United States Shipping Co.* v. *Empress Assurance Corporation*, [1907] 1 K. B. 259, CHANNELL, J., held that a charterer who sub-let the ship was entitled to recover the whole freight without deduction of the chartered freight which he would have had to pay the shipowner.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 16 (3).

(*b*) *Ibid.*, s. 16 (4).

(*c*) As regards the invoice price of goods shipped from a foreign port and expressed in the currency of a foreign country, see 1 Magens, Essay on Insurances, s. 40; 2 Phillips, Law of Insurance, s. 1231; *Thellusson* v. *Bewick* (1793), 1 Esp. 77; and Arnould on Marine Insurance, s. 366.

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 13.

(*e*) See Arnould on Marine Insurance, ss. 362, 363. It may be easily shown by algebra that the effect of applying the above formula is to enable the assured to recover the premium on the premium down to the total extinction of the risk.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 64 (1). As to general average losses, see pp. 447 *et seq.*, *ante*.

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by a peril insured against, such loss or damage, when not caused by a general average act so as to constitute a general average loss, is a particular average loss (*g*). "Particular average" does not include expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured. Such expenses are either general average or salvage charges, or they are so-called "particular charges."

Particular charges; salvage charges.

Distinction between the above classes of expenses.

896. It is important to notice carefully the distinction between these three classes of expenses. General average charges have already been dealt with (*h*). The term "salvage charges" means the charges which are recoverable under maritime law by a salvor independently of contract. The right to these is wholly dependent upon the success of the salvage operations (*i*); they do not include the expense of services in the nature of salvage rendered by the assured or his agents, or by any person employed for hire by them for the purposes of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges, or as a general average loss, according to the circumstances under which they were incurred (*k*). Thus expenses incurred for the preservation or safety either of ship or cargo, or freight, and not of the whole property at risk, are particular charges, and are neither general average, nor particular average, nor salvage charges.

Whether recoverable under suing and labouring clause.

Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by these perils, and are not recoverable under the suing and labouring clause (*l*). As will be seen (*m*), particular charges are recoverable under that clause.

(ii.) *The Suing and Labouring Clause* (*n*).

Clause is a supplementary agreement.

897. As to this clause the following points are to be noticed:—

The clause is an agreement supplementary to and distinct from the contract contained in the body of the policy, its object being to encourage the assured, in case of accident, to take all necessary steps for the preservation of the property insured. For

(*g*) In *Kidston* v. *Empire Insurance Co.* (1866), L. R. 1 C. P. 535, it was found by a special jury that in the business of marine insurance particular average denotes actual damage done to or loss of part of the subject-matter of the insurance, but that it does not include any expenses incurred in recovering or preserving the property insured, which were termed particular charges.

(*h*) See pp. 447 *et seq.*, *ante*.

(*i*) See title SHIPPING AND NAVIGATION.

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 65 (2); *Aitchison* v. *Lohre* (1879), 4 App. Cas. 755. The distinction between maritime salvage which is independent of contract, and salvage services rendered under a contract, must often be one of great nicety, inasmuch as no one has a right to render salvage services to a ship against the will of the master.

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 65 (1); *Aitchison* v. *Lohre*, *supra*. As to the conditions under which salvage remuneration is claimable and as to the amount recoverable therefor, see title SHIPPING AND NAVIGATION.

(*m*) See p. 457, *post*.

(*n*) This clause is set out in the form of Lloyd's policy, note (*p*), p. 340, *ante*.

this purpose the underwriters agree that any such action shall be without prejudice to the insurance or to the notice of abandonment in the case of a constructive total loss, and also to contribute to any expenditure incurred for the purpose of averting impending loss. It is because the clause is supplementary to and distinct from the contract contained in the body of the policy that the assured can recover in respect of a single loss, not only the whole amount insured, but also in addition to it the expenses incurred under the clause (*o*).

Covers particular charges.

898. The clause covers particular charges and not a general average loss, because by its very terms it is confined to expenses incurred for the safety and preservation of the particular property insured, and does not comprise expenses incurred for the safety of the whole adventure (*p*).

But not maritime salvage charges.

899. It does not cover maritime salvage charges, because maritime salvage services, as distinguished from services in the nature of salvage rendered under an agreement, are not rendered by the assured, their factors, servants, and assigns. Maritime salvage charges, therefore, are recoverable only under the head of a loss by a peril insured against, and cannot be recovered in addition to the sum insured (*q*).

Duty of the assured to take proper steps to safeguard the property.

900. Although the provision in the suing and labouring clause is of a permissive character, it is nevertheless the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss (*r*).

(*o*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 78 (1); *Lohre* v. *Aitchison* (1878), 3 Q.B.D. 558, C.A., *per* BRETT, L.J., at p. 567; and in the judgment in the same case in the House of Lords, *sub nom. Aitchison* v. *Lohre* (1879), 4 App. Cas. 755, *per* Lord BLACKBURN, at p. 763. The suing and labouring clause does not cover the costs incurred by the assured in successfully defending an action brought against them to recover a loss in respect of which the underwriters would have been liable under the running down clause (see p. 441, *ante*) (*Xenos* v. *Fox* (1869), L. R. 4 C. P. 665, Ex. Ch.). Nor does it apply to an insurance effected by a carrier of goods, not upon the cargo itself, but in order to protect himself from liabilities which he might incur as carrier (*Cunard Steamship Co.* v. *Marten*, [1903] 2 K. B. 511, C. A.).

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 78 (2), (3).

(*q*) *Ibid.*, s. 78 (2). See judgment of Lord BLACKBURN in *Aitchison* v. *Lohre*, *supra*; *Dixon* v. *Whitworth*, *Dixon* v. *Sea Insurance Co.* (1880), 4 Asp. M. L. C. 327, C. A.

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 78 (4), which seems to be taken from a *dictum* in the judgment in *Currie & Co.* v. *Bombay Native Insurance Co.* (1869), L. R. 3 P. C. 72, 81, 84. In *Kidston* v. *Empire Marine Insurance Co.* (1867), L. R. 2 C. P. 357, Ex. Ch., KELLY, C.B., at p. 365, in delivering the judgment of the Exchequer Chamber, said that, although not unreasonable, it had never been held to be law in this country that if the owner of freight fails to earn it by his own default he should be disentitled to recover it as against the insurer. The Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 78 (4), must be read in connection with s. 55 (*ibid.*), and it remains to be decided whether it enables the underwriter, who is liable for a loss, to counter-claim damages for a breach of duty on the part of the assured or his agents in not taking reasonable steps in order to avert or minimise the loss, or if not, what other effect is to be given to this provision. It seems clear that he cannot recover, under the suing and labouring clause, expenses which he

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Where the suing and labouring clause applies.

901. The occasion upon which the suing and labouring clause comes into force is the happening of any loss or misfortune covered by the policy; if it be not covered by the policy the clause has no operation. For instance, if a ship insured free of capture be in danger of being taken by an enemy, and the assured or his servants take steps to prevent the capture, this will not fall within the terms of the clause, and no charges incurred for this purpose will be recoverable. Similarly if the policy is one against total loss only, and there is danger, not of a total loss, but only of a partial loss, the expenses incurred to prevent such partial loss are not recoverable under the clause (*s*). But, if goods are insured free of average, or free of average under 5 per cent., and there is a danger of a total loss or a loss exceeding 5 per cent., which is averted by the action of the assured or his servants so that the resulting loss is not covered by the policy, the expenses so incurred to avert the loss may be recovered under the suing and labouring clause, although the actual loss cannot be claimed (*a*).

(iii.) *The Memorandum in the Policy.*

The memorandum in the policy.

902. There are certain commodities which by their nature are liable to be easily damaged by ordinary perils of the seas, and there are other subject-matters of insurance as to which it may be difficult to ascertain whether small losses are occasioned by the perils insured against or by the inherent vice of the subject-matters. It is for this reason that the clause known as the "memorandum" is inserted at the foot of Lloyd's policy (*b*).

Specification of articles in the memorandum.

903. As to the words by which the enumerated articles are described in the memorandum, it has been decided that the word "corn" includes "malt" (*c*), peas and beans (*d*), but not rice (*e*); and that the word "salt" does not include saltpetre (*f*). Evidence of usage is admissible to determine what is included in the description of the articles mentioned in the memorandum (*g*).

Construction of the memorandum:

(i.) Unless general;

904. The following points are to be noticed as to the construction of the memorandum, or of clauses similar in effect:—

The term at the end of the memorandum "unless general"

has incurred in saving or protecting the property (*Crouan* v. *Stanier*, [1904] 1 K. B. 87).

(*s*) *Great Indian Peninsula Rail. Co.* v. *Saunders* (1862), 2 B. & S. 266, Ex. Ch.; *Booth* v. *Gair* (1863), 15 C. B. (N. S.) 291. In the latter case the court proceeded, whether rightly or wrongly, on the ground that there was no risk of a total loss to the goods.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 78 (1); *Kidston* v. *Empire Insurance Co.* (1866), L. R. 1 C. P. 535, *per* WILLES, J., at pp. 542—544; affirmed (1867), L. R. 2 C. P. 357, Ex. Ch.; approved *Meyer* v. *Ralli* (1876), 1 C. P. D. 358.

(*b*) For the text of the clause, see note (*p*), p. 340, *ante*.

(*c*) *Moody* v. *Surridge* (1794), 2 Esp. 633.

(*d*) *Mason* v. *Skurray* (1780), 1 Park on Marine Insurance, 8th ed., pp. 245, 253.

(*e*) *Scott* v. *Bourdillion* (1806), 2 Bos. & P. (N. R.) 213.

(*f*) *Journu* v. *Bourdieu* (1787), 1 Park on Marine Insurance, 8th ed., p. 245.

(*g*) As to usages generally, see title CUSTOM AND USAGES, Vol. X., pp. 249 *et seq.*, 297 *et seq.* As to admissibility of evidence of usages, see *ibid.*, p. 260; and pp. 344 *et seq.*, *ante*.

means that the underwriter is not liable for a partial loss of or damage to the subject-matter insured, unless the loss or damage be in the nature of general average, but that for losses of the latter character he is liable (*h*). Moreover, where in the memorandum or any other clause in the policy the subject-matter is warranted free from particular average (*i*), either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against (*j*).

(ii.) Successive losses added together;

905. In the case of a voyage policy, successive distinct particular average losses, whether on ship, freight, or cargo, occurring during the voyage may be added together, so that if the aggregate exceeds the specified percentage the underwriter will be liable; but in the case of a time policy, the shipowner cannot add together all the losses that have occurred during the insured period; he can only add together such average losses as have occurred on the same voyage (*k*).

(iii.) General average loss cannot be added to particular average loss;

906. Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average, under a specified percentage, a general average loss cannot be added to particular average loss to make up the specified percentage (*l*).

(iv.) Regard is had only to the actual loss or damage;

907. For the purpose of ascertaining whether the specified percentage has been reached regard must be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded (*m*).

(v.) Basis of calculation;

908. The specified percentage is calculated not on the whole amount at risk under the policy, but only on that which was at risk at the time of the loss (*n*).

(vi.) Calculations upon articles separately or upon aggregate value;

909. Upon articles enumerated in the 5 per cent. clause in

(*h*) *Wilson* v. *Smith* (1764), 3 Burr. 1550; *Price & Co.* v. *A 1 Ships' Small Damage Insurance Association* (1889), 22 Q. B. D. 580, C. A.

(*i*) Sometimes insurances are effected "liable for total loss only." This clause is held to mean liable only in case of total loss, and to be equivalent to the clause "free of particular average." See judgments of WILLES, J., and of the Exchequer Chamber, in *Kidston* v. *Empire Insurance Co.* (1866), L. R. 1 C. P. 535; (1867), L. R. 2 C. P. 357; and of the Court of Queen's Bench delivered by BLACKBURN, J., in *Great Indian Peninsula Rail. Co.* v. *Saunders* (1861), 1 B. & S. 41, at p. 50; *Dixon* v. *Whitworth*, *Dixon* v. *Sea Insurance Co.* (1880), 4 Asp. M. L. C. 138, 327, C. A.

(*j*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 76 (2), Sched. I., r. 13 (*i.e.*, a total loss, or a loss amounting to the specified percentage; see p. 458, *ante*). It follows that, although salvage charges are recoverable as a loss by perils insured against, they do not constitute a particular average loss.

(*k*) *Stewart* v. *Merchants Marine Insurance Co.* (1885), 16 Q. B. D. 619, C. A.; *Price & Co.* v. *A 1 Ships' Small Damage Insurance Association*, *supra*, at p. 589.

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 76 (3), adopting the decision in *Price & Co.* v. *A 1 Ships' Small Damage Insurance Association*, *supra*.

(*m*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 76 (4).

(*n*) *Rohl* v. *Parr* (1796), 1 Esp. 445.

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the memorandum the proportion of damage is calculated upon the amount of each specified article taken separately, the meaning of the memorandum being that sugar shall be free of average under 5 per cent., hemp free of average under 5 per cent. etc. (*o*). But where, as in the 3 per cent. clause, the rest of the cargo, under the general term "all other goods," is warranted free of average, without any specification of distinct classes, it seems that the percentage of damage is calculated on their aggregate value, except in the case of articles separately valued in the policy (*p*). But the mere fact of articles of the same description being made up in separate packages is not enough, in the absence of a stipulation to the contrary, to allow the specified percentage to be calculated on each package (*q*). For this reason stipulations are often introduced into the policy, as, for example, in the case of a steamer, "hull valued at £——, machinery at £——, to pay average on each as if separately insured": or, in case of goods, "to pay average on each species, as though separate interests separately insured"; "to pay average on ten, fifteen or twenty hogsheads, succeeding numbers," or, "running landing numbers, as if etc.," as before. Where no such stipulations are introduced in the policy the assured may at his option calculate the percentage either on the whole amount or on the separate specified packages or interests (*r*).

(vii.) Where the contract is or is not severable;

910. More generally, where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but if the contract be apportionable, the assured may recover for a total loss of any apportionable part (*s*).

(viii.) Meaning of "unless stranded";

911. The memorandum contains at the end of it the clause "unless stranded." The meaning and effect of this clause is that where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding; provided that when the stranding takes place the risk has attached, and, if the policy be on goods, that the damaged goods are on board (*t*). But the stranding of a lighter in which goods are conveyed from ship to shore is not, in the absence of a stipulation to the contrary, within the exception (*u*).

(*o*) Stevens, Essay on Average in Marine Insurance, p. 223.

(*p*) Phillips, Law of Insurance, s. 1878.

(*q*) 1 Magens, Essay on Insurances, s. 61; Stevens, Essay on Average in Marine Insurance, p. 224.

(*r*) *Hagedorn* v. *Whitmore* (1816), 1 Stark. 157.

(*s*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 76 (1).

(*t*) *Ibid.*, Sched. I., r. 14, adopting the decisions in *Burnett* v. *Kensington* (1797), 7 Term Rep. 210; *Bowring* v. *Emslie* (1790), cited in 7 Term Rep. 215; *Thames and Mersey Marine Insurance Co.* v. *Pitts, Son & King*, [1893] 1 Q. B. 476; *Roux* v. *Salvador* (1835), 1 Bing. (N. C.) 526; *The Alsace Lorraine*, [1893] P. 209. As to the meaning attached by usage to a clause "warranted free from particular average and loss unless caused by stranding etc.," see *Otago Farmers' Co-operative Association of New Zealand* v. *Thompson*, [1910] 2 K. B. 145 (cargo condemned by sanitary authority—evidence of usage).

(*u*) *Hoffman* v. *Marshall* (1835), 2 Bing. (N. C.) 383; *Thames and Mersey Marine Insurance Co.* v. *Pitts, Son & King*, *supra*.

(ix.) Stranding;

912. A ship is not stranded within the meaning of the memorandum if she merely touches on the obstructing object, whether rock, bank, or whatever other nature, without remaining fixed upon it for some space of time, but, on the other hand, if she settles down in a quiescent state this is stranding, and the amount of damage sustained by the ship has nothing to do with the question of stranding or no stranding (*v*). There is no stranding where the ship takes the ground in the ordinary course of navigation (*a*). But where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of navigation in which the ship is engaged, but either wholly or in part, from some accidental or extraneous cause, there is a stranding (*b*). So where by temporary circumstances the bottom of a harbour is in a different condition to its ordinary state, and a vessel takes the ground in a different manner than that which was intended, she is stranded within the meaning of the memorandum (*c*).

(x.) Warranty is an exception from underwriter's liability.

913. Finally, it is important to notice that the warranty contained in the memorandum is an exception from the underwriter's liability under the policy, and that therefore, unless there are words

(*v*) *M'Dougle* v. *Royal Exchange Assurance* (1816), 4 Camp. 283; 4 M. & S. 503; *Dobson* v. *Bolton* (1799), 1 Park on Marine Insurance, 8th ed., p. 239; *Baker* v. *Towry* (1816), 1 Stark. 436; *Harman* v. *Vaux* (1813), 3 Camp. 429, overruling *Baring* v. *Henkle* (1801), 1 Marshall on Marine Insurance, 3rd ed., p. 232. A policy insuring against the loss of a vessel by "grounding or stranding" does not cover a loss of the sinking of the vessel in deep water (*Baker-Whiteley Coal Co.* v. *Marten* (1910), 26 T. L. R. 314).

(*a*) *Wells* v. *Hopwood* (1832), 3 B. & Ad. 20, *per* TAUNTON, J., at p. 27, *per* PARKE, J., at p. 29, and *per* Lord TENTERDEN, C.J., at p. 34; *Corcoran* v. *Gurney* (1853), 1 E. & B. 456, *per* Lord CAMPBELL, C.J., at p. 461; *Kingsford* v. *Marshall* (1832), 8 Bing. 458, *per* TINDAL, C.J., at p. 463; see also *Hearne* v. *Edmunds* (1819), 1 Brod. & Bing. 388; *Magnus* v. *Buttemer* (1852), 11 C. B. 876.

(*b*) *Carruthers* v. *Sydebotham* (1815), 4 M. & S. 77; *Fletcher* v. *Inglis* (1819), 2 B. & Ald. 315; *Rayner* v. *Godmond* (1821), 5 B. & Ald. 225; *Barrow* v. *Bell* (1825), 4 B. & C. 736; *Bishop* v. *Pentland* (1827), 7 B. & C. 219.

(*c*) *De Mattos* v. *Saunders* (1872), L. R. 7 C. P. 570; *Letchford* v. *Oldham* (1880), 5 Q. B. D. 538, C. A.; compare *Wells* v. *Hopwood*, *supra*; *Corcoran* v. *Gurney*, *supra*. The more modern form of marine policy extends the exceptions contained in the memorandum in Lloyd's policy by the insertion of the following clause, or some other similar form:—

"Warranted free from particular average, unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance. Underwriters. notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, reshipping, or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transhipment. Grounding in the Suez Canal not to be deemed a stranding, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom."

A partial burning of the ship may be within the scope of this clause, but whether a vessel is or is not a burnt ship is in any particular case a question of fact (*The Glenlivet*, [1893] P. 164; affirmed, [1894] P. 48, C. A.). As to whether a vessel is sunk within the meaning of the clause, see *Bryant and May* v. *London Assurance Corporation* (1886), 2 T. L. R. 591. As to the meaning of collision, see *Chandler* v. *Blogg* (1897), 3 Com. Cas. 18; *Richardson* v. *Burrows* (1880), cited in Lowndes, Law of Marine Insurance, 2nd ed., p. 199, *per* Lord COLERIDGE, C.J.; *The Munroe*, [1893] P. 248; *Union Marine Insurance Co.* v. *Borwick*, [1895] 2 Q. B. 279.

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clearly showing a contrary intention, the underwriter cannot be made liable under the memorandum for what would not be a peril insured against under the general words of the policy, *e.g.*, not for wear and tear or stranding in the ordinary course of navigation.

Apportionment of dock dues where ship is docked for repairs that fall on shipowner and underwriter, and both classes of repairs are simultaneously executed.

914. It sometimes happens that a ship is docked for the purpose of executing repairs of damage for which the underwriter is liable, and also repairs the cost of which has to be borne by the owner, such as wear and tear. In these cases both classes of repairs may be simultaneously executed, and expenses, such as putting into dock and dock dues, may be incurred which would have been necessary for either purpose alone. In these circumstances, in estimating whether the damage by perils insured against exceeds the 3 per cent. mentioned in the memorandum, those expenses must be divided between the underwriter and the owner, and, in the absence of some reason to the contrary, in equal proportion (*d*).

The question of the apportionment of expenses in cases similar to those above mentioned, apart from the memorandum in the policy, is dealt with elsewhere (*e*).

SUB-SECT. 3.—*Measure of Indemnity.*

(i.) *In General.*

The insured as his own underwriter.

915. Where the assured is insured for an amount less than the insurable value, or, in the case of a valued policy, for an

(*d*) *Marine Insurance Co.* v. *China Transpacific Steamship Co.* (1886), 11 App. Cas. 573 (known as the *Vancouver Case*). If the question were *res integra* and had not been decided by the House of Lords, it might well be doubted whether this decision was right; for in determining whether a loss is constructively total or not, contributions from the owners of other interests towards the repairs of general average damage are never taken into account, and it is difficult to see how the extent of damage is diminished by the fact that contributions may be recoverable from owners of other interests. The apportionment of these expenses was sought to be justified by the argument that the contract of marine insurance was a contract of indemnity, and that therefore the assured ought not to be allowed to gain any incidental benefit by the insurance, but it is to be observed that this contention was expressly overruled by Lord ESHER, M.R., at p. 577, and by Lord HERSCHELL, L.C., at p. 588. It is difficult to reconcile the *Vancouver Case, supra*, with *Ruabon Steamship Co.* v. *London Assurance*, [1900] A. C. 6 (known as the *Ruabon Case*); and there is an elaborate discussion in Arnould on Marine Insurance, s. 1005, on this point. It is to be noticed that in the *Vancouver Case, supra*, two classes of repairs were resolved upon as soon as the ship had been surveyed on going into dry dock, and it was assumed that the case ought to be dealt with as if the vessel had been docked for the purpose of executing both classes of repairs. On this point see the *Vancouver Case, supra, per* Lord BLACKBURN, at p. 593, and *per* Lord HERSCHELL, L.C., at p. 590. And it seems that it is only by reason of this assumption that the decision in the *Vancouver Case, supra*, can be reconciled with the *Ruabon Case*. It should further be noticed, as was observed by Lord MACNAGHTEN in the *Ruabon Case*, that it was not necessary in the *Vancouver Case* to decide anything more than that some part of the expenses must be borne by the underwriters, and that it was not at all necessary to determine that they were not liable for the whole amount of them. On the whole it seems unlikely that the decision in the *Vancouver Case, supra*, will be followed, except where the facts are substantially identical with those which were the subject-matter of that case. In *The Haversham Grange*, [1905] P. 307, C. A., the principle was applied in apportioning the damage occasioned by two wrong-doing vessels to a third vessel, but that case did not turn upon rights arising out of the contract of insurance or indemnity.

(*e*) See p. 468, *post*.

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amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance (*f*). He then bears such part of the loss as is proportional to the uninsured balance, and in case of a total loss is entitled to the same proportion of the salvage (*g*). For this reason it is convenient to consider him as his own underwriter, liable to pay to himself a sum proportional to the uninsured balance, for by so doing it may be laid down as a general proposition that each underwriter is liable for the loss in proportion to the amount underwritten by himself.

Measure of indemnity.

An assured may be said to be "fully" insured if in the case of an unvalued policy he is insured to the full extent of the insurable value of the subject-matter insured, or, in the case of a valued policy, to the full extent of the value fixed by the policy, and this will serve to explain the term "measure of indemnity," which is a new term introduced by the Act. This is the amount which the assured, if fully insured by the policy, can recover in respect of a loss, and it is called the "measure of indemnity" because the insurer, or each insurer if there be more than one, is liable to indemnify the assured against such proportion of the loss as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or, to the insurable value in the case of an unvalued policy (*h*).

Illustration.

Thus let M be the measure of indemnity, *i.e.*, the amount of any loss recoverable under a policy in which the assured is fully insured, let S be the amount subscribed by any one underwriter, and V be the value fixed by the policy in the case of a valued policy, or the insurable value in the case of an unvalued policy, then the underwriter is liable for $\frac{S}{V}$. M. Or, to take a concrete case, let a ship be valued at £10,000, and let an underwriter subscribe for £100, and let the ship be damaged to the extent of £500, the underwriter will be liable for $\frac{100}{10000}$. 500, or $\frac{1}{100}$ of £500, or £5. The loss, therefore, recoverable from any underwriter depends entirely upon the measure of indemnity as above defined.

Measure of indemnity in case of total loss.

916. It follows that when there is a total loss of the subject-matter insured, then, in the case of a valued policy, the measure of indemnity is the sum fixed by the policy, and, in the case of an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured (*i*).

(ii.) *In Case of Partial Loss of Goods.*

Measure of indemnity in case of a partial loss.

917. Where there is but a partial loss only, the measure of indemnity is determined by the following considerations and rules:—

As to goods arriving sea-damaged.

If the insured goods or some of them arrive sea-damaged, then,

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 81.
(*g*) *The Welsh Girl* (1906), 22 T. L. R. 475.
(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 67 (1) (2).
(*i*) *Ibid.*, s. 68. In *Woodside* v. *Globe Marine Insurance Co.*, [1896] 1 Q. B. 105, the rule was applied, though when the peril insured against occurred the ship had already sustained a constructive total loss. See also *Lidgett* v. *Secretan* (1871), L. R. 6 C. P. 616; *Barker* v. *Janson* (1868), L. R. 3 C. P. 303.

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as the damaged goods can seldom be repaired and are always intended to be sold (differing in this respect from the ship) (*k*), the first thing to be ascertained is the extent of the depreciation caused by the damage. This is done by comparing the price for which the goods would have sold, had they arrived sound, with the price for which they actually do sell in their damaged condition. Where the goods are sold by public auction the gross amount they realise is called the "damaged value," and the value they would have sold for if sound, that is to say, the current price for sound articles of the same kind in the same market, is called the "sound value." It is proved (*l*) that the difference between the damaged and the sound values, arrived at in the manner just described, properly determines the depreciation of the goods caused by the damage, and is entirely independent of the rise or fall of the market value of the goods. These gross values are generally the price realised, or the market or estimated value calculated on the assumption that freight, landing charges, and duty have been paid beforehand; but where the goods are such as are customarily sold in bond, the bonded price is deemed to be the gross value (*m*).

The "damaged value."

The "sound value."

Gross value.

The percentage of loss.

The extent of depreciation, measured by the proportion which the difference between the sound and damaged values bears to the sound value, may be conveniently called the percentage of loss. It is this percentage of loss which is the measure of indemnity, or, in other words, the total amount for which all the underwriters, including the assured himself, if he be not fully insured, are liable (*n*).

As to goods part of which are totally lost during the voyage.

918. When an integral part of the goods is totally lost by the perils insured against, for example, where one package out of several packages of the same description is lost, the underwriters will have to pay that portion of the insurable or agreed value which the goods lost bear to all the goods of the same description covered by the insurance, or, in other words, this is the measure of indemnity in respect of such loss (*o*). But where several different

(*k*) See *Lohre* v. *Aitchison* (1877), 2 Q. B. D. 501, *per* LUSH, J., at p. 507; and *Aitchison* v. *Lohre* (1879), 4 App. Cas. 755, *per* Lord BLACKBURN, at p. 762.

(*l*) *I.e.*, in the celebrated judgments in *Lewis* v. *Rucker* (1761), 2 Burr. 1167, 1170; and *Johnson* v. *Sheddon* (1802), 2 East, 581. Where damaged goods prior to sale are necessarily conditioned, it is the value of the conditioned goods, and not that of the goods less the cost of conditioning, that is to be compared with the sound value in order to ascertain the proportion of loss, for the cost of conditioning is recoverable under the suing and labouring clause (*Francis* v. *Boulton* (1895), 65 L. J. (Q. B.) 153); as to which, see p. 456, *ante*.

(*m*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 71 (4); and see p. 466, *post*.

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 71 (3); and see p. 463, *ante*. It may be easily shown that, whether the policy be a valued or an unvalued one, the underwriter is liable to pay in respect of goods arriving in a damaged condition the same percentage of the amount actually subscribed by him. Thus, if the agreed value be V, the amount subscribed by the underwriter S, and the percentage of loss r per cent, then the measure of indemnity is $\frac{r}{100}\ V$, and the underwriter is liable for $\frac{r}{100}\ V \times \frac{S}{V}$ or $\frac{r}{100} \times S$.

(*o*) Stevens, Essay on Average in Marine Insurance, p. 150; Benecké, Principles

articles are insured together in the same policy and each sustains sea damage, the loss must be adjusted separately on each, even though the clause "to pay average on each species as if separately insured" be not inserted in the policy (*p*).

When out of a number of packages of goods insured only a few articles or pieces in each package arrive sea-damaged, the sound and damaged goods are frequently sold together at the same auction, but in such case the diminished value at which the sound part of the package may sell, owing to the assortment being broken, is not a loss for which the underwriter is liable (*q*), nor is he liable for the cost of examining such goods as prove to be undamaged (*r*).

Goods sold at a port of distress.

919. It sometimes happens that goods are sold at a port of distress, because they are found to be so damaged as not to be fit for reloading. In such case the claim is adjusted as a salvage loss, that is, the underwriters pay the difference between the insurable or agreed value of the goods and the net proceeds of the sale (*s*).

Statutory provisions. Marine Insurance Act, 1906.

920. The above-mentioned rules of law and practice as to the adjustment of the particular average on goods are consistent with, and most of them are embodied in, the following provisions of the Act (*t*):—

Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where part of the goods, merchandise or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy (*t*):

(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss (*t*):

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed

of Indemnity in Marine Insurance, p. 150; *Lewis* v. *Rucker* (1761), 2 Burr. 1167; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 71 (1), (2).

(*p*) Stevens, Essay on Average in Marine Insurance, p. 153; Benecké, Principles of Indemnity in Marine Insurance, p. 441.

(*q*) *Cator* v. *Great Western Insurance Co. of New York* (1873), L. R. 8 C. P. 552; *Lysaght* (*J.*), *Ltd.* v. *Coleman*, [1895] 1 Q. B. 49, C. A.; *Brown Brothers* v. *Fleming* (1902), 7 Com. Cas. 245. As to the charges, such as brokerage and commission, incurred in the sales by auction of the damaged goods, see Stevens, Essay on Average in Marine Insurance, pp. 148—150; Benecké, Principles of Indemnity in Marine Insurance, p. 436.

(*r*) *Lysaght* (*J.*), *Ltd.* v. *Coleman*, *supra*.

(*s*) Stevens, Essay on Average in Marine Insurance, p. 81; Benecké, Principles of Indemnity in Marine Insurance, p. 444.

(*t*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 71. It seems that "gross proceeds" in the last sentence of s. 71 (*ibid.*) must mean "gross value," in cases where the goods have been sold.

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by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value (*u*):

(4) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers (*u*).

Apportionment of valuation.

Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by the Act (*v*).

Over net arrived sound values.

Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods (*w*).

(iii.) *In case of Partial Loss of Ship.*

As to partial loss on ship.

921. Where a ship is damaged, but is not totally lost, the liability of the underwriter is determined by the following rules:—

The measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs (*a*), less the customary deductions, but not exceeding the sum insured in respect of any one casualty (*b*):

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above (*b*):

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above (*b*).

(*u*) See note (*t*), p. 465, *ante*.

(*v*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 72 (1).

(*w*) *Ibid.*, s. 72 (2). For definition of "sound value," see p. 464, *ante*.

(*a*) As to the nature of the repairs which the assured is entitled to require, see *Agenoria Steamship Co.* v. *Merchants' Marine Insurance Co.* (1903), 8 Com. Cas. 212.

(*b*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 69.

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922. As regards the last rule (*c*), it deals only with the case where the ship has not been repaired and has not been sold in her damaged state during the risk. Where the ship after sustaining an average loss is sold by her owner unrepaired, he is entitled to recover the estimated cost of repairs less the usual deduction, not exceeding the depreciation in value of the vessel (*d*).

As to customary deductions.

923. It is customary to deduct one-third from the whole expense, both of labour and materials which the repairs have cost, unless the ship be a new ship. This deduction is termed "deducting one-third new for old," and is made because the repairs will generally make the ship a better and more valuable vessel than she was before she was damaged (*e*). But this rule is subject to certain exceptions and modifications which are sometimes expressed in clauses contained in the policy, or are implied by reference to the York-Antwerp Rules, or, when these are not incorporated, by the rules usually followed by average adjusters, and contained in the Institute clauses (*f*).

Deducting "one-third new for old."

Deduction is not made in case of a new ship.

924. This deduction, however, is not made in the case of a new ship on her first voyage. Whether the vessel be or be not on her first voyage is a question of fact, as to which, if any general principle at all can be laid down, it is that she is on her first voyage at the time of the damage if the damage takes place at any part of what may be considered an integral voyage out and home at the commencement of which it was a new ship, taking into account the charterparty, the policy, and all the facts of the case (*g*). Again, if an old ship be newly repaired immediately before sailing on the voyage on which the loss takes place, and the loss falls exclusively on the new materials, the deduction of one-third new for old seems not to apply (*h*). It is otherwise if the damage can only be proved to fall chiefly on the new part (*i*).

Deduction of value of old materials etc.

925. When old materials are thrown aside in making the repairs, the practice in England is first to deduct the third, and then to deduct the value of the old materials, and this seems on

(*c*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 69 (3).

(*d*) This was decided by a majority of the Court of Appeal in *Pitman* v. *Universal Marine Insurance Co.* (1882), 9 Q. B. D. 192, C. A., BRETT, L.J., who was of opinion that the estimated cost of repairs was in all cases the measure of the loss, dissenting. See also *Bristol Steam Navigation Co.* v. *Indemnity Mutual Marine Insurance Co.* (1887), 6 Asp. M. L. C. 173.

(*e*) As to the operation of this rule, see *Aitchison* v. *Lohre* (1879), 4 App. Cas. 755, *per* Lord BLACKBURN, at p. 762.

(*f*) As to the York-Antwerp Rules, see pp. 346, 450, *ante*, and p. 508, *post*. As to the Institute Clauses, see note (*m*), p. 346, *ante*.

(*g*) *Fenwick* v. *Robinson* (1828), 3 C. & P. 323; *Pirie* v. *Steele* (1837), 8 C. & P. 200.

(*h*) Stevens, Essay on Average in Marine Insurance, p. 172.

(*i*) *Poingdestre* v. *Royal Exchange Corporation* (1826), Ry. & M. 378. The deduction "one-third new for old" will not be made in certain cases where the assured by no fault of his own, by reason of the ship never coming into his possession again, never derives any benefit from the repairs (*Da Costa* v. *Newnham* (1788), 2 Term Rep. 407 (default of underwriters); distinguish *Humphreys* v. *Union Insurance Co.* (1824), 3 Mason, 429 (American) (shipowner in default).

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principle to be the correct rule (*j*). It is also the practice in this country to make the same deduction for any increased expenditure which may be incurred in raising funds for the repairs, such as the marine interest on a bottomry bond, but this practice seems inconsistent with principle, inasmuch as the interest has not any effect in enhancing the value of the ship (*k*).

Deduction of expenses of removal.

It is sometimes reasonably necessary to remove a vessel from a port of distress to another port for the purpose of repairing her. In such a case the expenses incurred in and about such removal are in practice made payable by the underwriters (*l*), and this practice seems right, inasmuch as these expenses being necessary in order to repair the vessel may be properly considered as part of the cost of repairs.

Apportionment of expenses when repairs falling on the owner and repairs for which underwriters are liable are simultaneously executed.

926. In cases where, as mentioned above in dealing with the memorandum (*m*), repairs of sea damage for which the underwriters are liable, and also repairs the cost of which has to be borne by the owners such as wear and tear etc., are executed simultaneously, the question arises whether the underwriter is or is not liable for the whole of the expenses which would have been necessary for repairing the sea damage.

In general, the underwriter is liable for the whole of those expenses, and is not entitled to make any deduction on the ground that the shipowner has availed himself of the ship being in dock as a convenient opportunity for doing repairs or other work for which the underwriters are not liable. Thus where during the voyage insured a vessel is damaged by a peril insured against, and is put into dry dock for necessary repairs, and the owners, without causing delay or increased dock expenses, take advantage of her being in dry dock to have the survey made for renewing her classification, the expenses of getting her into and out of dock, as well as the necessary expenses incurred in having the use of the dock, will fall on the underwriters alone, and will not be apportioned between them and the owners (*n*).

(*j*) McArthur, Contract of Marine Insurance, 2nd ed., p. 214; Lowndes, Law of Marine Insurance, s. 296.

(*k*) McArthur, Contract of Marine Insurance, 2nd ed., p. 214; compare *Rosetto* v. *Gurney* (1851), 11 C. B. 176.

(*l*) See rules of practice of the Association of Average Adjusters, Arnould on Marine Insurance, Appendix D.

(*m*) See p. 462, *ante*.

(*n*) *Ruabon Steamship Co.* v. *London Assurance*, [1900] A. C. 6. It is difficult to reconcile completely *Marine Insurance Co.* v. *China Transpacific Steamship Co.* (1886), 11 App. Cas. 573, with the *Ruabon Steamship Co.* v. *London Assurance*, *supra*. As to the grounds on which it has been thought possible to differentiate the two cases, see *The Haversham Grange*, [1905] P. 307, *per* COLLINS, M.R., at p. 314, and the *Ruabon Steamship Co.* v. *London Assurance*, *supra*, *per* Lord BRAMPTON, at p. 16. See also the discussion of this point in Arnould on Marine Insurance, s. 1035. The effect of the decision in *Marine Insurance Co.* v. *China Transpacific Steamship Co.*, *supra*, has been fully considered in dealing with measure of indemnity; see p. 462, *ante*. In *The Haversham Grange*, *supra*, the facts were as follows:—In order to effect repairs necessitated by two collisions for which the owners of two wrong-doing vessels were liable, the plaintiffs, the owners of the damaged vessel, put her into dry dock and proceeded to repair at the same time the separate damage sustained in each collision, and it was held that the defendants, the owners

927. As regards the repairs themselves, the assured is entitled to have his ship repaired with materials and workmanship corresponding to the original work, and if the repairs are done in such a manner that the ship is a less valuable ship than she was originally, the assured is entitled to claim, in addition to the cost of repairs, compensation for the diminution of the value of the ship (*o*).

Nature of repairs.

928. As to successive losses happening during the currency of the same policy, the previously existing law is embodied in the Act (*p*) as follows:—

As to successive losses.

(1) Unless the policy otherwise provides, and subject to the provisions of the Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured (*q*).

Marine Insurance Act, 1906.

(2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss (*q*).

Nothing in this provision affects the liability of the insurer under the suing and labouring clause (*q*).

Repairs to total loss.

929. If a ship is actually repaired during the currency of the policy and is afterwards, but before the expiration of the policy, totally lost, before arriving at her port of destination on the insured voyage, the cost of such repairs may be recovered in addition to the total loss (*r*); but where no such repairs have been made the particular average loss is merged in the subsequent total loss, and the assured can only recover under the policy as for a total loss (*s*). It follows that it is only at the moment of the expiration of the policy that the liability of the underwriter for a partial loss is definitely determined (*t*). Thus if a ship warranted free from capture sustains an average loss and is afterwards, before any repairs are done, captured, the underwriter would not be liable at all under the policy, not for the average loss, because it is merged in the total loss, and not for the total loss by capture, because the insurance was warranted free of capture (*u*). But this doctrine of merger applies only to a case where the partial and total loss both occur during the currency of the same policy. Thus, suppose a ship is insured by two policies—one at and from London to Calcutta and for thirty days after arrival, and the other a valued policy at and from Calcutta to England. During the currency of the first policy she sustains serious damage and is kept afloat only by continual

Merger of particular average loss in subsequent total loss.

one of the wrong-doing vessels, were liable for a proportion of the dry docking and incidental expenses. This case had, therefore, nothing to do with insurance law.

(*o*) *Agenoria Steamship Co.* v. *Merchants' Marine Insurance Co.* (1903), 8 Com. Cas. 212, 217; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 69 (2).

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41).

(*q*) *Ibid.*, s. 77.

(*r*) This rule, however, does not apply to repairs which the owner has not paid for, and for which he does not remain liable, *e.g.*, when their cost has been defrayed with money raised on bottomry (*The Dora Forster*, [1900] P. 241).

(*s*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 77 (2).

(*t*) *Knight* v. *Faith* (1850), 15 Q. B. 649, *per* Lord CAMPBELL, C.J., at p. 668.

(*u*) *Livie* v. *Janson* (1810), 12 East, 648.

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pumping until she arrives at Calcutta, where she is placed in dry dock for repairs. After part of the repairs have been carried out and after the expiration of the first policy she is totally destroyed by fire when in dry dock. In these circumstances the assured would be entitled to recover under the first policy the full amount of the partial loss repaired or unrepaired, and under the second valued policy he would be entitled to recover the full amount insured as for a total loss (*v*).

(iv.) *In case of Partial Loss of Freight.*

Recovery for partial loss of freight. Marine Insurance Act, 1906.

930. The rule as to the amount recoverable for a partial loss of freight is laid down in the Act as follows (*a*):—

Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy (*a*).

Although it is only the net freight that is really lost by the assured, the insurable value is the gross freight at risk, plus the charges of insurance (*b*).

Partial loss of freight insured by valued and unvalued policies.

931. Freight is generally insured in valued policies, and in such case where only part of the full cargo to which the valuation was intended to apply was on board or contracted for at the time of the loss, the underwriter is liable only to pay on such proportion of the amount insured as the part of the cargo on board, or contracted for, bears to the full intended cargo (*c*). When the policy on freight is an unvalued policy, and only part of the cargo is on board or contracted for at the time of the loss, and that part is totally lost, the underwriter is liable only to pay the actual amount of freight which would have been earned by the carriage of that part, together with premiums and cost of insurance (*d*).

(v.) *In respect of Liability to Third Party.*

Insurance against liability to third party.

932. Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him in respect of such liability (*e*).

(*v*) *Lidgett* v. *Secretan* (1871), L. R. 6 C. P. 616; compare *Barker* v. *Janson* (1868), L. R. 3 C. P. 303; *Woodside* v. *Globe Marine Insurance Co.*, [1896] 1 Q. B. 105.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 70.

(*b*) *Ibid.*, s. 16 (2); see p. 370, *ante*. This rule was first established by evidence of usage see (*Palmer* v. *Blackburn* (1822), 1 Bing. 61; *United States Shipping Co.* v. *Empress Assurance Corporation*, [1907] 1 K. B. 259; affirmed, without deciding any question of law, [1908] 1 K. B. 115, C. A.).

(*c*) *Forbes* v. *Aspinall* (1811), 13 East, 323; *Denoon* v. *Home and Colonial Assurance Co.* (1872), L. R. 7 C. P. 341; *The Main*, [1894] P. 320; compare *Tobin* v. *Harford* (1864), 17 C. B. (N. S.) 528, Ex. Ch. (policy on cargo).

(*d*) *Forbes* v. *Cowie* (1808), 1 Camp. 520; *Forbes* v. *Aspinall*, *supra*, *per* Lord ELLENBOROUGH, C.J., at p. 326. See further, as to commencement of risk on freight, p. 392, *ante*.

(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 74.

A carrier of goods, as already noticed, has, as a bailee, an insurable interest in the goods themselves; but he may also expressly insure against the liability he may incur to the owner for loss (*f*).

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(vi.) *In respect of General Average and Salvage Charges, and other Cases.*

933. As to the measure of indemnity in cases of general average contributions and salvage charges, the Act (*g*) provides as follows:—

Measure of indemnity in general average contribution or salvage charges. Marine Insurance Act, 1906.

(1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under-insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute (*g*).

(2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle (*g*).

The contributory value and the insurable value may evidently be different, inasmuch as the former is generally the value at the port of adjustment, whereas the latter is the value at the commencement of the voyage, and the above rule provides for the case where such difference exists (*h*).

934. The Act (*i*) contains the following general provision:—

General provision. Marine Insurance Act, 1906.

Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing (*k*) provisions of the Act the measure of indemnity shall be ascertained as nearly as may be in accordance with those provisions in so far as applicable to the particular case (*i*).

SECT. 15.—*Total Loss.*

SUB-SECT. 1.—*In General.*

(i.) *Distinction between Actual and Constructive Total Loss.*

935. A loss may be either total or partial. Any loss other than a total loss is a partial loss. A total loss may be either an actual total loss or a constructive total loss (*l*).

Distinction between actual and constructive total loss.

(*f*) See p. 369, *ante*. As to whether an insurance by a carrier is an insurance on the goods or an insurance against liability to the owners thereof, see *Cunard Steamship Co.* v. *Marten*, [1903] 2 K. B. 511, C. A. As to the construction of clauses effected in policies by carriers in respect of goods carried by them, see *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478; *Joyce* v. *Kennard* (1871), L. R. 7 Q. B. 78.

(*g*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 73.

(*h*) The above principle was applied in *Steamship Balmoral Co.* v. *Marten*, [1902] A. C. 511. For the treatment of value at the port of adjustment, see p. 452, *ante*.

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 75 (1).

(*k*) See pp. 462 *et seq.*, *ante*.

(*l*) See pp. 472 *et seq.*, 480 *et seq.*, *post*.

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In the case of an actual total loss (which is also commonly called an absolute total loss) the assured is entitled to recover from the underwriter the whole amount subscribed by him without giving any notice of abandonment; whereas in the case of a constructive total loss the assured, being at liberty to elect whether to treat the loss as a total or a partial loss, cannot recover for a total loss unless he has given due notice of abandonment.

Effect of Marine Insurance Act, 1906.

As it is by no means certain that the provisions of the Act (*m*) relating to this subject have not altered the law in some material respects, it is necessary to set out those provisions, and to compare them with the law as it stood at the time of the passing of the Act (*n*).

(ii.) *Actual Total Loss in case of Ship or Goods.*

Statutory provisions.

936. The following are the provisions of the Act (*n*) relating to the distinction between an actual or absolute total loss and a constructive total loss.

Marine Insurance Act, 1906.

Where the subject-matter insured is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss (*o*).

Subject to any express provision in the policy, where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred, there is a constructive total loss (*p*).

Notice of abandonment unnecessary.

937. In the cases covered by the above definition of an actual total loss, as it is impossible for the assured to treat the loss as a partial loss, he has no election to make, and therefore need not give any notice of abandonment (*q*).

Election.

On the other hand, in cases where there is no actual total loss, but where a prudent man not insured would decline any further expense in prosecuting an adventure the termination of which will probably never be successfully accomplished, the assured may, for his own benefit as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, still exists and is vested in him, the very principle of the indemnity requires that he should make a cession of all his rights to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, so that the underwriter may be entitled to

(*m*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 56 (1), (2).

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), which came into operation on 1st January, 1907.

(*o*) *Ibid.*, s. 57 (1).

(*p*) *Ibid.*, s. 60 (1). For the remaining clauses of s. 60 (*ibid.*), see p. 481, *post*.

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 57 (2), which is evidently intended to reproduce substantially the statement in Lord ABINGER'S judgment in *Roux v. Salvador* (1836), 3 Bing. (N. C.) 266, Ex. Ch., that "there is an absolute total loss where the thing insured is wholly destroyed or annihilated by the perils insured against or is by the same perils wholly and irretrievably lost to the assured, so that it is totally out of his power or that of the underwriter to procure its arrival."

all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value (*r*). In all these cases, not only the thing assured, or part of it, is supposed to exist *in specie*, but there is a possibility, however remote, of its not arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so, but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before (*s*).

Actual total loss by the ship ceasing to be a thing of the kind insured.

938. In accordance with the first branch of the statutory definition of an actual total loss (*t*), if a ship be wrecked and dismantled so as completely to lose her character as a ship, and to become a mere congeries of materials which could be used for rebuilding the vessel, there is an actual total loss of the ship, even if the wreck be brought to the port of destination (*u*).

(*r*) As to the commercial considerations on which the doctrine of constructive total loss is founded, see *Goss* v. *Withers* (1758), 2 Burr. 683, *per* Lord MANSFIELD, C.J., and *Hamilton* v. *Mendes* (1761), 2 Burr. 1198.

(*s*) *Roux* v. *Salvador* (1836), 3 Bing. (N. C.) 266, Ex. Ch., *per* Lord ABINGER, C.J., at pp. 286, 287. This is the leading case on actual and constructive total losses. It should be noticed that the only points actually decided in this case are:—First, that the warranty free from average in the memorandum has only the effect of excluding an indemnity for a partial loss, and that whether there is a partial loss or not must be determined independently of the memorandum. Secondly, that if goods insured are damaged to such an extent that they cannot be made fit for transhipment and carried to the port of destination without being totally destroyed, or damaged to such an extent as not to arrive *in specie*, then, if the assured receives the news of the damage to the goods and of their sale at the same time, he may recover as for a total loss without notice of abandonment. It is to be further observed that the insurance in *Roux* v. *Salvador*, *supra*, was on goods and not on ship, though there are certain *dicta* in that celebrated judgment (see p. 286, *ibid.*) to the effect that if the ship be so damaged that she cannot be repaired so as to be capable of proceeding to her port of destination, there is an absolute total loss of the ship. These *obiter dicta* are, as will be seen later on, inconsistent with numerous cases, and also with the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 57 (1). The proposition criticised would seem to be correct if "repair" were substituted for "destination." It may further be noticed that on carefully comparing *ibid.*, ss. 60 (1), 61 (as to which see p. 478, *post*), it will be found that they are not completely consistent with each other. It would have been probably more correct to have stated the grounds on which a constructive total loss may be founded, and then to have added that those grounds will not give rise to a constructive total loss unless due notice of abandonment be given.

(*t*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 57 (1); see p. 472, *ante*.

(*u*) *Cambridge* v. *Anderton* (1824) 2 B. & C. 691. The facts of this case are best stated in 1 C. & P. 213. The judgment, which proceeded on the assumption (whether right or wrong) that the ship had lost her character as a ship, and had become a mere congeries of planks, has been followed in *Levy & Co.* v. *Merchants Marine Insurance Co.* (1885), 1 T. L. R. 228; see also, on this point, *Allen* v. *Sugrue* (1828), 8 B. & C. 561, *per* Lord TENTERDEN, C.J., at p. 564;

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Again, if a ship is so injured that she cannot sail without repairs and cannot be taken to a port at which the necessary repairs could be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship (*v*).

On the other hand, although the ship be so seriously damaged as not to be worth repairing, still, if she can be taken to a port, and repaired, there is no actual total loss unless she is so broken up as to have completely lost her character as a ship (*w*).

Similarly as to goods.

939. Similarly if the insured goods are so damaged by the perils insured against that they have in a mercantile sense lost their original character, and are not saleable under their ordinary denomination, or that they exist only in the form of a nuisance, this is an absolute total loss, and this is so even if the goods have reached their port of destination. Thus if hides which are insured be so damaged by perils insured against that they have changed their form and can be sold only as glue, manure, or ashes, there is an actual total loss of the hides whether or not they have reached their port of destination (*x*).

Goods incapable of identification.

940. Where goods reach their destination *in specie*, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, not total, all the owners of the goods which cannot be identified becoming tenants in common (*y*).

Perishable goods are, as has been stated (*a*), generally insured "free of average," and this clause amounts to a stipulation that the underwriter is not to be liable for anything short of a total loss. Thus the question whether the underwriter is liable for a total loss of the insured goods generally arises in cases where they are insured free of average. But whether the loss is to be held total or partial within the meaning of the clause depends entirely on the general principles regulating the matter, for the clause does

better reported, Dan. & Ll. 188, at p. 192; *Stewart* v. *Greenock Marine Insurance Co.* (1848), 2 H. L. Cas. 159.

(*v*) *Barker* v. *Janson* (1868), L. R. 3 C. P. 303, *per* WILLES, J.; *Moss* v. *Smith* (1850), 9 C. B. 94, *per* MAULE, J., at p. 102.

(*w*) *Barker* v. *Janson*, *supra*, *per* WILLES, J.; *Martin* v. *Crokatt* (1811), 14 East, 465; *Bell* v. *Nixon* (1816), Holt (N. P.), 423; *Fleming* v. *Smith* (1848), 1 H. L. Cas. 513; *Knight* v. *Faith* (1850), 15 Q. B. 649. The proposition last mentioned in the text is, however, subject to a further proposition which is discussed later on (see p. 476, *post*), that if, after a constructive total loss, there is a justifiable sale by the master, no notice of abandonment need be given, at any rate where the news of the loss and sale reach the assured at the same time.

(*x*) *Roux* v. *Salvador* (1836), 3 Bing. (N. C.) 266, 277, 278, Ex. Ch.; *Burnett* v. *Kensington* (1797), 7 Term Rep. 210, 222; *Dyson* v. *Rowcroft* (1803), 3 Bos. & P. 474, 476, overruling the decision of Lord MANSFIELD in *Cocking* v. *Fraser* (1785), 1 Park on Marine Insurance, 8th ed., p. 247; *Cologan* v. *London Assurance Co.* (1816), 5 M. & S. 447, 455; *Asfar & Co.* v. *Blundell* (1895), 1 Com. Cas. 71, 185, C. A.; *Saunders* v. *Baring* (1876), 34 L. T. 419; *Montreal Light, Heat, and Power Co.* v. *Sedgwick*, [1910] A. C. 598, P. C. (cement destroyed by barge being submerged, a total loss of the goods "by total loss of vessel").

(*y*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 56 (5); *Spence* v. *Union Marine Insurance Co.* (1868), L. R. 3 C. P. 427.

(*a*) See p. 458, *ante*.

not in the least vary the rules which determine whether a loss is partial or total, or whether notice of abandonment need be given to make the underwriters liable (*b*).

Damage to goods to constitute actual total loss must involve destruction *in specie*.

On the other hand, no amount of damage to the insured goods will constitute an actual total loss unless their damage involves their total destruction *in specie*. Thus, if wheat valued at £1,000 is insured free of average from Waterford to Liverpool, and the ship is run aground to prevent her sinking and in consequence her hull is completely under water every high tide, still, if any portion of the wheat can be got out of the ship and can be sent on to Liverpool so as to be sold there as wheat, although at a price less than its freight, the assured cannot recover as for a total loss without giving notice of abandonment (*c*).

A loss of part of the goods does not constitute a total loss, unless the contract of insurance is severable.

941. In general there is no total loss of the insured goods unless there is a total loss of all of them (*d*). The only exception to this rule is where the contract contained in the policy is severable, either by reason of express stipulation in the policy or because the goods are separately valued, or because the insured goods consist of separate articles wholly distinct in their nature so that they must be considered as separately insured.

As an illustration of the last of these cases, suppose that the master of a ship insures £100 on his effects on board free of average, and, the ship having taken fire, he succeeds in saving his chronometer but the rest of his effects to the value of £60 are burnt, the saving of the chronometer will not prevent the master from recovering the loss of his other effects (*e*).

Actual total loss where the assured is irretrievably deprived of the subject-matter insured.

942. In accordance with the second branch of the statutory definition (*f*), there is an actual total loss where the assured is irretrievably deprived of the subject-matter insured. Thus, if the ship founders in mid-ocean, and there is no chance of raising her or the goods on board of her, this constitutes an actual total loss of the ship and goods. If, on the other hand, there is a reasonable

(*b*) *Roux* v. *Salvador* (1836), 3 Bing. (N. C.) 266, 277, 278, Ex. Ch. As to what amounts to a total loss of disbursements under a policy on disbursements "free from all average," see *Lawther* v. *Black* (1901), 6 Com. Cas. 196, C. A. As to the cases in which notice of abandonment is necessary, see p. 481, *post*.

(*c*) *Anderson* v. *Royal Exchange Assurance Co.* (1805), 7 East, 38; *Cunningham* v. *Maritime Insurance Co.*, [1899] 2 I. R. 257; *Hedburg* v. *Pearson* (1816), 7 Taunt. 154; *Navone* v. *Haddon* (1850), 9 C. B. 30; *M'Andrews* v. *Vaughan* (1793), 1 Park on Marine Insurance, 8th ed., p. 252; *Mason* v. *Skurray* (1780), 1 Park on Marine Insurance, 8th ed., p. 253, overruling the decision of YORKE, C.J., at Nisi Prius in *Boyfield* v. *Brown* (1736), 2 Stra. 1065; *Glennie* v. *London Assurance Co.* (1814), 2 M. & S. 371. The proposition in the text does not, however, as is shown later on (see p. 476, *post*), apply to a case where there is a constructive total loss of the goods during the insured voyage and they are justifiably sold by the master, and the news of the damage and the sale reach the assured at the same time.

(*d*) *Ralli* v. *Janson* (1856), 6 E. & B. 422, Ex. Ch., overruling *Davy* v. *Milford* (1812), 15 East, 559, and the *dicta* in some earlier cases.

(*e*) *Duff* v. *Mackenzie* (1857), 3 C. B. (N. S.) 16. See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 76 (1), the provisions of which are dealt with at p. 460, *ante*. The law on this subject is further illustrated by the following cases:—*Hills* v. *London Assurance Corporation* (1839), 5 M. & W. 569; *Entwistle* v. *Ellis* (1857), 2 H. & N. 549; *Wilkinson* v. *Hyde* (1857) 3 C. B. (N. S.) 30.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 57 (2); see p. 472, *ante*.

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chance of raising the ship or goods, although only at a very great outlay, this is not an actual, but only a constructive total loss (*g*). Again, if the subject-matter insured is captured, condemned, and sold, there is an actual total loss (*h*).

Missing ship.

943. Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed (*i*).

(iii.) *Constructive Total Loss followed by Justifiable Sale is Actual Total Loss.*

Constructive total loss followed by justifiable sale.

944. Where there is a constructive total loss of the subject-matter insured, whether ship or goods, and this is followed by a justifiable sale by the master, then, at any rate if the news of the loss and of the sale reach the assured at the same time, no notice of abandonment need be given, and therefore the loss is treated as an actual total loss (*k*). But it is important to observe that it is not the mere fact of sale which entitles the assured to recover for a total loss without notice of abandonment, for there is no such head in insurance law as loss by sale (*l*). The true ground is that the justifiable sale has deprived the owner of his property, and there is nothing to abandon, nor any use in giving notice of abandonment (*m*).

True ground for recovery.

If perishable goods are so damaged that it is impossible to carry them to their destination, and they are left at a port of distress without being sold there, it seems that notice of abandonment should be given, since the subject-matter insured is still in existence and opportunity should be given to the insurer to deal with it as he thinks proper (*n*).

The Act (*o*) contains no express provision as to a constructive

(*g*) *Anderson* v. *Royal Exchange Assurance Co.* (1805), 7 East, 38; *Doyle* v. *Dallas* (1831), 1 Mood. & R. 48; *Kemp* v. *Halliday* (1866), L. R. 1 Q. B. 520, Ex. Ch.; *Sailing Ship "Blairmore" Co.* v. *Macredie*, [1898] A. C. 593. As to constructive total loss, see, further, p. 480, *post*.

(*h*) *Stringer* v. *English etc. Insurance Co.* (1869), L. R. 4 Q. B. 676; affirmed *sub nom. Stringer* v. *English and Scottish Marine Insurance Co.* (1870), 5 Q. B. 599, Ex. Ch.

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 58; *Houstman* v. *Thornton* (1816), Holt (N. P.), 242; *Koster* v. *Reed* (1826), 6 B. & C. 19.

(*k*) *Roux* v. *Salvador* (1836), 3 Bing. (N. C.) 266, Ex. Ch.; *Cossman* v. *West*, *Cossman* v. *British America Assurance Co.* (1887), 13 App. Cas. 160, P. C.; *Cobequid Marine Insurance Co.* v. *Barteaux* (1875), L. R. 6 P. C. 319; *Navone* v. *Haddon* (1850), 9 C. B. 30, *per* MAULE, J., at p. 44; *Farnworth* v. *Hyde* (1866), L. R. 2 C. P. 204, Ex. Ch.; *Saunders* v. *Baring* (1876), 34 L. T. 419; *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83, 102, 157; *Australasian Steam Navigation Co.* v. *Morse* (1870), L. R. 4 P. C. 222; see also *Knight* v. *Faith* (1850), 15 Q. B. 649, and the comments on that case by BLACKBURN, J., in *Rankin* v. *Potter*, *supra*, at p. 130. As to constructive total loss becoming actual by continuance of perils, see *Levy & Co.* v. *Merchants' Marine Insurance Co.* (1885), 52 L. T. 263.

(*l*) *Gardner* v. *Salvador* (1831), 1 Mood. & R. 116, *per* BAYLEY, B., at p. 117; *Navone* v. *Haddon*, *supra*.

(*m*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (7), and *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 467, C. A., *per* COTTON, L.J., at p. 480. On this principle, where an insurer has reinsured his risk, no notice of abandonment need be given, inasmuch as there is nothing to abandon.

(*n*) *Kaltenbach* v. *Mackenzie*, *supra*; compare *Mansell & Co.* v. *Hoade* (1903), 20 T. L. R. 150 (cattle slaughtered by reason of quarantine regulations preventing their being landed).

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41).

total loss being followed by a justifiable sale, but the law, as above stated, may be deduced from the provision for the case where the assured is irretrievably deprived of the subject-matter insured (*p*), and also from the provision (*q*) that "notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him" (*r*). Whether the sale is justifiable or not is a question for the jury, subject, of course, to the direction of the judge (*s*).

Implied effect of Marine Insurance Act, 1906.

If, for example, the master cannot obtain sufficient funds for repairing the ship, and it appears that he will not be able to obtain them before the ship shall become an actual total loss, he will be justified in selling her, and after such sale, the loss may be treated as an actual total loss (*t*), provided the assured first hears of the loss and the sale at the same time (*u*).

Effect of act of assured.

On the other hand, even where a constructive total loss has taken place, followed by a sale, the assured may, by his own conduct in electing to take the proceeds of the sale, instead of making his claim against the underwriters, if he thereby alters the position of facts so as to affect their interests, forfeit his claim to recover for a total loss (*v*).

(iv.) *Actual Total Loss of Freight.*

In general.

945. As regards freight, the following preliminary points must be borne in mind.

The underwriter is not liable for the loss of freight unless it has been proximately occasioned by the perils insured against; he is therefore not liable if the loss was proximately caused by the act of the assured (*a*).

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 57 (1); see p. 472, *ante*.

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (7).

(*r*) As the master has no authority to sell the ship or the goods unless the danger of an absolute total loss is so imminent that there is no time for him to communicate with the owners, considerable caution must be used in applying the earlier cases on the subject on account of the enormous increase in the facilities for communication. It has also to be noticed that where the assured receives information of the loss before there has been any sale, he must in general at once give notice of abandonment to the underwriters in order to be entitled to claim for a total loss; see *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 467, C. A. As to this point, see the treatment of constructive total loss, at pp. 480 *et seq.*, *post*.

(*s*) For the law as to the master's authority to sell ship or cargo in cases of necessity, see *Hunter* v. *Parker* (1840), 7 M. & W. 322; *Robertson* v. *Clarke* (1824), 1 Bing. 445; *Mount* v. *Harrison* (1827), 4 Bing. 388; and title SHIPPING AND NAVIGATION.

(*t*) *Somes* v. *Sugrue* (1830), 4 C. & P. 276, *per* TINDAL, C.J., at p. 283; *Morris* v. *Robinson* (1824), 3 B. & C. 196; *Cannan* v. *Meaburn* (1823), 1 Bing. 243.

(*u*) See p. 477, *ante*.

(*v*) *Mitchell* v. *Edie* (1787), 1 Term Rep. 608; and see *Roux* v. *Salvador* (1836), 3 Bing. (N. C.) 266, *per* Lord ABINGER, C.J., at p. 286; *Allwood* v. *Henckell* (1795), 1 Park on Marine Insurance, 8th ed., p. 399; *Saunders* v. *Baring* (1876), 34 L. T. 419, 421.

(*a*) See pp. 437 *et seq.*, *ante*, and the following cases there noticed:—*M'Carthy* v. *Abel* (1804), 5 East, 388; *Scottish Marine Insurance Co.* v. *Turner* (1853), 4 H. L. Cas. 312; *The Bedouin*, [1894] P. 1, C. A.; *The Alps*, [1893] P. 109, as distinguished from *Inman Steamship Co.* v. *Bischoff* (1882), 7 App. Cas. 670.

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Further, there is no total loss of chartered freight by the perils of the seas unless there is a total loss of the ship; thus there is no such total loss merely because the expense of repairing her so as to enable her to bring home the entire cargo would amount to a sum exceeding the value of the freight though less than the value of the ship when repaired (*b*).

Actual total loss of freight.

946. There is an actual total loss of insured freight where, by the perils insured against, the right to the freight is destroyed, and the assured is irretrievably deprived thereof (*c*). Thus where the freight insured is chartered freight to be earned by a ship engaged to carry a cargo from one named port to another, there will be an actual total loss of freight if the ship becomes a total loss before she arrives at the former port (*d*). Similarly, there is an actual total loss of insured bill of lading freight if ship and cargo are totally lost (*e*). There is also an actual total loss of chartered freight where the ship is prevented by sea perils from arriving at the port of loading except after such a delay as would entirely frustrate the commercial object of the affreightment and consequently discharge the charterer from his obligation to load the agreed cargo (*f*).

In all these cases the right to freight is destroyed, and there is nothing left to abandon. For the same reason, there is an actual total loss under a policy on commissions or profits if the goods are totally lost by perils insured against (*g*).

(v.) *Rights of the Assured on the Occurrence of a Constructive Total Loss.*

Position on the occurrence of a constructive total loss.

947. Before entering into details as to what constitutes a constructive total loss, attention is drawn to the position of the assured when such a total loss has occurred. On this subject the Act (*h*) contains the following provisions.

Marine Insurance Act, 1906.

948. Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss (*i*).

(*b*) *Moss* v. *Smith* (1850), 9 C. B. 94; see also *Philpott* v. *Swann* (1861), 11 C. B. (N. S.) 270, as to whether the earning of freight after constructive total loss of ship will have the effect of adeeming the total loss of freight, or whether freight so earned ought only to be considered as salvage, see *Barque Robert S. Besnard Co., Ltd.* v. *Murton* (1909), 101 L. T. 285.

(*c*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 57.

(*d*) *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83.

(*e*) *Thompson* v. *Taylor* (1795), 6 Term Rep. 478; *Horncastle* v. *Suart* (1806), 7 East, 400; *Mackenzie* v. *Shedden* (1810), 2 Camp. 431; see also *Devaux* v. *J'Anson* (1839), 5 Bing. (N. C.) 519; *Atty* v. *Lindo* (1805), 1 Bos. & P. (N. R.) 236; *Wilson* v. *Forster* (1815), 6 Taunt. 25; compare *Everth* v. *Smith* (1814), 2 M. & S. 278; *Brocklebank* v. *Sugrue* (1831), 1 Mood. & R. 102; *Barclay* v. *Stirling* (1816), 5 M. & S. 6.

(*f*) *Jackson* v. *Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125, Ex. Ch.; *Re Jamieson and Newcastle Steamship Freight Insurance Association*, [1895] 2 Q. B. 90, C. A.; and see title SHIPPING AND NAVIGATION.

(*g*) Partial loss of bill of lading freight may be total loss of profit on charter (*Asfar & Co.* v. *Blundell*, [1896] 1 Q. B. 123, C. A.).

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41).

(*i*) *Ibid.*, s. 61.

Where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss (*k*).

Rights of assured.

The assured may then, if he please, treat the loss as a partial loss (*l*); but if he does so, or if he fails to give due notice of abandonment, he cannot, unless in the event the loss becomes actually total (*m*), recover for a total loss in respect of the same disaster (*n*). He is not, however, prevented from recovering for a total loss in respect of a subsequent disaster. For instance, if the insured ship be captured and the assured does not give due notice of abandonment, and the ship is afterwards recaptured and lost by the perils of the sea, the assured is not prevented from recovering for a total loss in respect of the second disaster (*o*). Moreover, it seems that there may be cases where a mere prolongation of time during which the assured is deprived of his property, may have the effect of reviving the right of abandonment on giving due notice thereof (*p*).

Insurance against total loss includes constructive loss.

949. Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive as well as an actual loss (*q*); and where the assured brings an action for a total loss, he may, unless the policy otherwise provides, recover for a partial loss (*r*).

(vi.) *Ademption of Total Loss.*

Ademption of total loss.

950. At the time of the passing of the Act (*s*) it was a doctrine of English insurance law that, although a constructive total loss had occurred and due notice of abandonment had been given, the assured could not recover for a total loss, if before action brought the subject-matter insured had been restored under such circumstances that he might be reasonably expected to take possession of it.

Explanation of doctrine.

A total loss was said to have been "adeemed" if the loss did not continue to be total at the commencement of the action (*t*). Thus, if the ship or goods had been captured, then, although due notice of abandonment was given, still if the property was released so that the assured might reasonably be expected to take possession

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (1). See *Western Assurance Co. of Toronto* v. *Poole*, [1903] 1 K. B. 376, *per* BIGHAM, J., at p. 383. This rule must be read subject to the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (7), (8), (9), as to which see p. 376, *ante*, and pp. 486, 488 *et seq.*, *post*.

(*l*) *Woodside* v. *Globe Marine Insurance Co.*, [1896] 1 Q. B. 105; see also *Aitchison* v. *Lohre* (1879), 4 App. Cas. 755; *Pitman* v. *Universal Marine Insurance Co.* (1882), 9 Q. B. D. 192, C. A., *per* BRETT, L.J., at p. 208; *Mellish* v. *Andrews* (1812), 15 East, 13, *per* Lord ELLENBOROUGH, C.J., at p. 16.

(*m*) See p. 472, *ante*.

(*n*) *Anderson* v. *Royal Exchange Assurance Co.* (1805), 7 East, 38.

(*o*) Compare *Woodside* v. *Globe Marine Insurance Co.*, *supra*; *Mellish* v. *Andrews*, *supra*.

(*p*) Phillips, Law of Insurance, ss. 1669, 1672, 1674; compare *Stringer* v. *English and Scottish Marine Insurance Co.* (1870), L. R. 5 Q. B. 599, Ex. Ch.

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 56 (3).

(*r*) *Ibid.*, s. 56 (4).

(*s*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), which came into operation on 1st January, 1907.

(*t*) *Shepherd* v. *Henderson* (1881), 7 App. Cas. 49, *per* Lord BLACKBURN.

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of it, he could only recover for a partial loss (*u*). On the other hand, the mere release or restitution of the insured property would not have this effect if the assured might eventually have to pay more for it than it was worth, and therefore could not reasonably be expected to take possession of it (*v*).

Peculiarity of law of England.

This doctrine is peculiar to English law. According to the law of Scotland, the Continent, and the United States, a constructive total loss followed by due notice of abandonment definitely fixes the rights of the parties, and the assured's right to recover for a total loss is in no way affected by subsequent events (*w*).

Effect of Marine Insurance Act, 1906.

Under the foregoing provisions of the Act (*a*) the right of the assured in case of constructive total loss to abandon the subject-matter insured and treat the loss as if it were an actual total loss is apparently unqualified, and although the Act (*b*) enters with much detail into the law relating to constructive total loss and abandonment, it contains no provision that a constructive total loss is adeemed by events which take place after due notice of abandonment.

The courts will therefore have to decide whether the Act was not intended to assimilate the law of England to that of Scotland and other countries, so that a constructive total loss followed by due notice of abandonment definitely fixes the right of the assured to recover for a total loss (*c*).

SUB-SECT. 2.—*Constructive Total Loss.*

(i.) *Statutory Definition.*

What constitutes a constructive total loss.

951. Whether the conditions prescribed by the Act (*d*) as essential to a constructive total loss are or are not satisfied is in each case a question of fact (*e*).

(*u*) *Hamilton* v. *Mendes* (1761), 2 Burr. 1198; *Bainbridge* v. *Neilson* (1808), 10 East, 329; *Patterson* v. *Ritchie* (1815), 4 M. & S. 393; *Brotherston* v. *Barber* (1816), 5 M. & S. 418; *Naylor* v. *Taylor* (1829), 9 B. & C. 718.

(*v*) *M'Iver* v. *Henderson* (1816), 4 M. & S. 576; *Cologan* v. *London Assurance Co.* (1816), 5 M. & S. 447; *Holdsworth* v. *Wise* (1828), 7 B. & C. 794; *Naylor* v. *Taylor*, *supra*; *Parry* v. *Aberdein* (1829), 9 B. & C. 411; *Lozano* v. *Janson* (1859), 2 E. & E. 160; *Ruys* v. *Royal Exchange Assurance Corporation*, [1897] 2 Q. B. 135 (where it was decided that the doctrine does not apply to a case where the restitution of the insured property has taken place after the commencement of the action and during the trial).

(*w*) The English doctrine was disapproved of by Lord ELDON, L.C., in *Smith* v. *Robertson* (1814), 2 Dow, 474, H. L.; and Lord HALSBURY, L.C., in *Sailing Ship "Blairmore" Co.* v. *Macredie*, [1898] A. C. 593, suggested that it only applied to cases of capture and similar cases. As to the meaning of a clause "to pay a total loss thirty days after official news of the embargo or capture, without waiting for condemnation," see *Fowler* v. *English and Scottish Marine Insurance Co.* (1865), 18 C. B. (N. S.) 818.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 61; see p. 478, *ante*.

(*b*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41). As to constructive total loss and abandonment, see the text, *infra*.

(*c*) If the total loss, whether actual or constructive, is before action brought adeemed by the acts of the assured or his servants, the assured cannot recover for a total loss, but is entitled to be recouped, under the suing and labouring clause (as to which see p. 456, *ante*), the expenses incurred in saving the subject-matter insured (*Kidston* v. *Empire Marine Insurance Co.* (1867), L. R. 2 C. P. 357, Ex. Ch.).

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (1); see p. 472, *ante*, and pp. 481 *et seq.*, *post*.

(*e*) See, for example, *Farnworth* v. *Hyde* (1866), L. R. 2 C. P. 204, Ex. Ch.;

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The following provisions on this subject explanatory of the general propositions already set out (*f*) are contained in the Act (*g*).

In particular, there is a constructive total loss—

Marine Insurance Act, 1906.

(i.) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered (*g*); or

(ii.) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired (*g*).

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired (*g*); or

(iii.) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival (*g*).

Two main grounds on a constructive total loss may be founded.

There are thus two main grounds on which a constructive total loss may be founded. The assured may, by the perils insured against, be deprived of the possession of the insured property in circumstances which make it unlikely that he can recover it within any assignable time. For instance, it may be captured by the enemy, or by the assured's own Government, or by pirates (*h*), or a ship may be deserted by the master and crew.

In the second place, although the assured may not be forcibly dispossessed of the insured property, it may be so damaged by the perils insured against that the cost of repairing the damage or of carrying the goods to the port of destination may be so great as to make it in the mercantile sense impracticable to incur that cost (*i*).

Notice of abandonment.

952. In all such cases, in order to recover for a total loss, the assured should give notice of abandonment (*j*).

Comparison of Marine Insurance Act, 1906, s. 60 (1) and s. 60 (2).

953. As regards s. 60 (1) of the Act (*k*), two points have to be particularly noticed.

Rodoconachi v. *Elliott* (1874), L. R. 9 C. P. 518, Ex. Ch.; *Mullett* v. *Shedden* (1811), 13 East, 304; *Mellish* v. *Andrews* (1812), 15 East, 13; *Stringer* v. *English and Scottish Marine Insurance Co.* (1870), L. R. 5 Q. B. 599, Ex. Ch.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (1); see p. 472, *ante*, which says "subject to any express provision in the policy," because the parties are at liberty to define, and do sometimes define, in the policy what is to be considered a constructive total loss (*Re Sunderland Steamship Co. and North of England Iron Steamship Insurance Association* (1894), 11 T. L. R. 106, C. A.; *Rowland and Marwood's Steamship Co.* v. *Marine Insurance Co.* (1901), 6 Com. Cas. 160).

(*g*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (2).

(*h*) See *Goss* v. *Withers* (1758), 2 Burr. 683; *Ruys* v. *Royal Exchange Assurance Corporation*, [1897] 2 Q. B. 135.

(*i*) *Moss* v. *Smith* (1850), 9 C. B. 94, 103.

(*j*) *Hamilton* v. *Mendes* (1761), 2 Burr. 1198, 1212; see p. 486, *post*.

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (1); see p. 472, *ante*.

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In the first place, it sets forth generally the grounds on which a constructive total loss may be founded, whereas s. 60 (2) of the Act (*l*) states certain particular instances or illustrations. Thus the case of a damaged ship having been salved, and salvage charges having to be paid in order to release her, is not mentioned in the latter provision (*l*), but it is covered by the former (*q*), and there is a constructive total loss where the salvage charges, together with the cost of repairs, exceed the value of the ship when repaired.

Loss of voyage is no equivalent to total loss of ship.

In the second place, there is an essential distinction between an insurance on ship and an insurance on goods. An insurance on ship is a contract of indemnity against damage to, destruction or loss of the vessel, but not against the ship being prevented by perils insured against from arriving at her point of destination; whereas an insurance on goods is a contract of indemnity not only against damage, but also against the goods being prevented by perils of the seas from being carried to a port of destination. In other words, a loss of the insured voyage by reason of damage to the ship does not constitute a total loss of the ship (*m*).

(ii.) *Constructive Total Loss of Ship: Elements to be considered in estimating Cost of Repairs.*

Damage to ship may give rise to constructive total loss.

954. As regards the cost of repairs in the case of damage to ship, it is clear that in ascertaining whether there is a constructive total loss, no deduction is to be made of one-third new for old (*n*).

Moreover, if in order to repair the ship it be necessary to incur expenses for the purpose of obtaining possession from salvors or for the purpose of getting her off the rocks, these and other expenses for the like purpose must be taken into account either as cost of repairs, or more probably as being necessary for the preservation or recovery of the ship (*o*). Similarly, if temporary repairs are to be done at a port of refuge in order to enable the ship to be completely repaired at another port, both the temporary and the permanent repairs must be taken into account. In fact it must be always borne in mind that s. 60 (2) (ii.) of the Act (*p*) only refers to one particular case in which the damage to a ship may give rise to a constructive total loss, other cases being covered by the more general provision in s. 60 (1) of the Act (*q*).

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (2); see p. 481, *ante*.

(*m*) In *Goss* v. *Withers* (1758), 2 Burr. 683; *Hamilton* v. *Mendes* (1761), 2 Burr. 1138, 1209; and *Milles* v. *Fletcher* (1779), 1 Doug. (K. B.) 231, Lord MANSFIELD, C.J., expressed the opinion that if the voyage is absolutely lost or not worth pursuing this might constitute a total loss of the ship, but this opinion is contrary to the decisions in *Pole* v. *Fitzgerald* (1752), Willes, 641; affirmed in House of Lords (1754), 4 Bro. Parl. Cas. 439; *Parsons* v. *Scott* (1810), 2 Taunt. 363; *Falkner* v. *Ritchie* (1814), 2 M. & S. 290; *Brown* v. *Smith* (1813), 1 Dow, 349, H. L.; *Doyle* v. *Dallas* (1831), 1 Mood. & R. 48, 55; *Naylor* v. *Taylor* (1829), Dan. & Ll. 240, 254. In fact it is now clear law that the loss of the voyage has nothing to do with the loss of the ship.

(*n*) *Henderson Brothers* v. *Shankland & Co.*, [1896] 1 Q. B. 525, C. A.; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (2) (ii.). As to the deduction "one-third new for old," see p. 467, *ante*.

(*o*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (1), (2) (i.), (ii).

(*p*) *Ibid.*, s. 60 (2) (ii.); see p. 481, *ante*.

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (1); see p. 472, *ante*.

All repairs necessary to make good damage insured against must be estimated.

955. It seems that some of the *dicta* in the earlier cases in which it was held that the cost of such repairs only must be taken into account as are necessary to enable the ship to sail in ballast to the port of destination, or to be navigable for any trade whatever, cannot any longer be considered good law (*r*), and that all the repairs must be estimated which are necessary to make good the damage caused by the perils insured against (*s*).

Question whether the value of the wreck is to be taken into account in determining whether there is a total loss.

956. In determining whether a vessel has been so damaged by perils insured against as to give rise to a constructive total loss, the question has arisen whether the assured is entitled to add to the cost of the repairs the value of the damaged vessel, or rather of the wreck, for breaking up purposes (*t*). The effect of a recent decision of the House of Lords (*u*), overruling a decision of the Court of Appeal (*v*), is that, as the law stood immediately before the Act (*w*) was passed, the assured was entitled to make this addition, because the true test was whether a prudent uninsured owner would not rather sell the damaged ship than repair her.

(*r*) See especially Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (2) (i.), (ii.), and p. 481, *ante*.

(*s*) Such *dicta* are to be found in *Doyle* v. *Dallas* (1831), 1 Mood. & R. 48, and other cases. On the other hand, see the direction of ERLE, C.J., in *Phillips* v. *Nairne* (1847), 4 C. B. 343, and the direction of KENNEDY, J., in *North Atlantic Steamship Co.* v. *Burr* (1904), 9 Com. Cas. 164, and in *Agenoria Steamship Co.* v. *Merchants' Marine Insurance Co.* (1903), 8 Com. Cas. 212. If the repair of the damage caused by peril of the seas makes it necessary also to repair the decayed parts of the vessel, no deduction is to be made from the cost of the first-named repairs on the ground that the decayed parts are also made good (*Phillips* v. *Nairne*, *supra*, where the judgment in the American case of *Hyde* v. *Louisiana State Insurance Co.* (1824), 2 Martin (N.S.), 410, was approved).

(*t*) All the authorities bearing upon this subject are collected in the two following cases. It was decided in *Angel* v. *Merchants' Marine Insurance Co.*, [1903] 1 K. B. 811, C. A., that the value of the wreck was not to be taken into account; but this case was overruled in the House of Lords in *Macbeth & Co., Ltd.* v. *Maritime Insurance Co., Ltd.*, [1908] A. C. 144. The principle is stated by Lord LOREBURN, L.C., at pp. 147, 148 (*ibid.*), as follows: "This question admits of ready answer as soon as it is ascertained what is the true test by which a court is to be guided. Really the choice lies between two. One is that a ship has become a constructive total loss if the cost of repairing her would exceed her value when repaired. The other is that she has become so when a prudent uninsured owner would not repair her having regard to all the circumstances. . . . If this were an open question, there seems to me ground for arguing that the former is the sound view. But I think this is not really an open question, notwithstanding the recent decision in *Angel's Case*. . . . When once the test of what a prudent uninsured owner would do, whether he would sell the ship where she lies or repair her, is admitted, it follows that the value of the ship where she lies must enter into the calculation. And this test has been laid down repeatedly by many high authorities over a long period of time. I think it was too late to disturb it in 1903." See also *Wild Rose Steamship Co.* v. *Jupe* (1903), 19 T. L. R. 289.

(*u*) *I.e.*, in *Macbeth & Co., Ltd.* v. *Maritime Insurance Co., Ltd.*, *supra*; see note (*t*), *supra*.

(*v*) *Angel* v. *Merchants' Marine Insurance Co.*, *supra*; see note (*t*), *supra*.

(*w*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), which came into operation on 1st January, 1907.

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It is now enacted (*x*) that there is a constructive total loss in case of damage to a ship, where she is so damaged that the cost of repairing the damage would exceed her value when repaired, and express provision is made as to what deductions are and what are not to be made in estimating the cost of such repairs. This provision is precise and definite, and was enacted before the decision of the Court of Appeal (*y*) had been overruled. It is submitted, therefore, that, according to the canon of construction to be applied to a consolidating statute (*a*), the value of the wreck, in a case governed by the Act (*b*), ought not to be taken into account, or in other words that the test whether a prudent uninsured owner would rather sell than repair has ceased to be applicable (*c*).

No deduction for general average contributions to cost of repairs.

957. In estimating the cost of repairs no deduction is to be made in respect of general average contributions to those repairs payable by other interests, for such contributions, like contributions from tortfeasors, do not directly affect the amount of actual damage (*d*).

(iii.) *Elements of Repaired Value.*

Insured value not regarded for purpose of constructive total loss.

958. As to the value of the ship, no regard is to be had, unless the policy contains some express provision to the contrary, to the sum at which the ship may be valued in the policy. Thus, if the cost of repairs would be £10,500 and the marketable value of the ship when repaired would only be £9,000, there is a constructive total loss although the ship may be valued in the policy at £20,000 (*e*).

When the ship is of a peculiar and exceptional character.

Whether the chartered freight should be taken into account.

959. Generally the value of the ship with which the cost of the repairs is to be compared is her selling price, but in the case of a peculiar and exceptional vessel built for her owners with a view to a particular trade, it is evident the market price would not afford a true measure of her value, and it is therefore necessary to ascertain what value the repaired vessel would be to her owners (*f*). The market value of a vessel depends upon her general

(*x*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (2) (ii.).
(*y*) See note (*t*), p. 483, *ante*.
(*a*) See p. 335, *ante*.
(*b*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41).
(*c*) See Arnould on Marine Insurance, s. 1124.
(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c, 41), s. 60 (2) (ii.); see pp. 481 *et seq.*, *ante*; *Kemp* v. *Halliday* (1866), L. R. 1 Q. B. 520, Ex. Ch.; *Uzielli* v. *Boston Marine Insurance Co.* (1884), 15 Q. B. D. 11, C. A. On the other hand, account is to be taken of the expense of future salvage operations and any future general average contributions to which the ship would be liable if repaired (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (2) (ii.)).
(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 27 (4); *Young* v. *Turing* (1841), 2 Man. & G. 593, Ex. Ch.; *Irving* v. *Manning* (1847), 1 H. L. Cas. 287. Policies now sometimes contain the clause that the insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss, and the policies of many insurance clubs have a clause barring claims for constructive total loss unless the estimated cost of the repairs is equal to 80 per cent. of the value declared on the policy, although the cost of repairs may be greater than the value of the ship when repaired. See *Forwood* v. *North Wales Insurance Co.* (1880), 9 Q. B. D. 732, C. A.; *North Atlantic Steamship Co.* v. *Burr* (1904), 9 Com. Cas. 164.
(*f*) See the judgment of WOOD, V.-C., in *African Steam Ship Co.* v. *Swanzy*

capacity to earn freight, and the better opinion seems to be that in estimating her repaired value for the purpose of a constructive total loss, the fact that she was at the time of the loss under a peculiarly profitable charter should not be taken into account (*g*).

(iv.) *Constructive Total Loss of Goods.*

When damaged goods constitute constructive total loss.

960. As to the constructive total loss of goods, it is clear that if it be practicable to carry to the port of destination any part, however small, of the insured cargo, there is no constructive total loss (*h*); it is equally clear, on the other hand, that any expenses which have to be incurred to enable the goods to be so carried must be taken into account (*i*)—for instance, not only the cost of unshipping the cargo, drying, warehousing and re-shipping, but also the amount of the salvage which may have to be paid in respect of the cargo saved (*j*).

What amount of freight has to be taken into account.

961. As regards the cost of sending the cargo or any part of it on, it was decided, before the passing of the Act (*k*), that it was only the increased cost of sending it on at a higher than the original rate of freight which could be taken into consideration (*l*). The correctness of this decision was, however, impugned by eminent average adjusters, who strongly contended that the whole of the original freight, or, if the goods had to be forwarded by another ship, the whole of the freight paid to the latter ship, must be taken into consideration (*m*).

Considering the doubts entertained as to the above-mentioned

(1856), 2 K. & J. 660, 664; *The Ironmaster* (1859), Sw. 441; *The Harmonides*, [1903] P. 1; *Grainger* v. *Martin* (1862), 2 B. & S. 456; affirmed (1863), 4 B. & S. 9, Ex. Ch.

(*g*) See Arnould on Marine Insurance, s. 1125. On the other hand, account is to be taken of the expense of future salvage operations, and any future general average contributions to which the ship would be liable if repaired (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (2) (ii.)); see p. 481, *ante*.

(*h*) *Rosetto* v. *Gurney* (1851), 11 C. B. 176, 182, 190. As to what constitutes a constructive total loss of goods, see Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (2) (i.), (iii.); see p. 481, *ante*. If a sale of the cargo be not otherwise justifiable it will not be rendered so by being made under a decree of a vice-admiralty court or any other similar court abroad (*Reid* v. *Darby* (1808), 10 East, 143; "*Segredo*," otherwise "*Eliza Cornish*" (1853), 1 Ecc. & Ad. 36, *per* Dr. LUSHINGTON).

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (1), (2) (iii.); see pp. 472, 481, *ante*.

(*j*) But where the master hypothecates the ship and cargo to pay expenses for repairing the ship, the debt and costs paid to the holder of the bottomry bond are not to be taken into consideration in estimating the extent, whether total or partial, of the loss, inasmuch as the underwriter does not insure in respect of a loss by hypothecation (*Rosetto* v. *Gurney*, *supra*; and see p. 468, *ante*).

(*k*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), which came into operation on 1st January, 1907.

(*l*) See the two leading cases, *Rosetto* v. *Gurney*, *supra*; *Farnworth* v. *Hyde* (1866), L. R. 2 C. P. 204, Ex. Ch.

(*m*) In Arnould on Marine Insurance, ss. 1152—1159, the arguments on both sides are fully discussed, but the only question now material is whether the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), has done away with the rule of law which must undoubtedly be taken to have existed before the statute came into force.

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decision and the explicit language of the Act (*n*), it is submitted that the latter (*n*) has the effect of overruling that decision, in other words, that according to the principle of construction applicable to a consolidating statute (*o*), the "cost of forwarding the goods" to their destination cannot be held to mean merely the excess, if any, of the substituted freight over the original freight.

(v.) *Constructive Total Loss of Freight.*

Constructive total loss of freight.

962. In applying the definition of constructive total loss (*p*) to freight the points which have already been noticed must be borne in mind. First, that there is no total loss of freight merely because the expenses of repairing the ship so as to enable her to carry the entire cargo would exceed the value of the freight (*q*); and secondly, that notice of abandonment is unnecessary where, at the time the assured received information of the loss, there would be no possibility of benefit to the insurer if notice were given to him (*r*). This latter rule has generally the effect of rendering notice of abandonment of freight unnecessary, because in almost all cases the insurer would derive no benefit from notice being given to him. Thus no decided case is to be found in which the assured has lost his right to recover for a total loss of freight by reason of his not having given notice of abandonment (*s*).

SUB-SECT. 3.—*Notice of Abandonment.*

(i.) *Form of Notice.*

Form of notice of abandonment.

963. The notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer (*t*).

It must be unconditional.

In order that the abandonment to the underwriter may be valid, it must be unconditional and must also extend, unless the contract of insurance be severable, to the whole of the interest of the assured in the property at risk at the time of the disaster so far as such interest is covered by the policy. But the policy may be so

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (2) (iii.); see p. 481, *ante*.

(*o*) See p. 335, *ante*.

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60 (1); see pp. 472, 481, *ante*.

(*q*) See p. 478, *ante*, and note (*b*) *ibid.*

(*r*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (7).

(*s*) See the judgments in *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83, and the judgment of BRETT, J., at p. 99, *ibid.*, where the judge indicated some cases of constructive total loss of freight in which in his opinion notice of abandonment ought to be given.

(*t*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (2). See *Currie & Co.* v. *Bombay Native Insurance Co.* (1869), L. R. 3 P. C. 72, in which the Judicial Committee disapproved of the judgment of Lord ELLENBOROUGH, C.J., in *Parmeter* v. *Todhunter* (1808), 1 Camp. 541. See *Thelluson* v. *Fletcher* (1793), 1 Esp. 73; *King* v. *Walker* (1864), 3 H. & N. 209, Ex. Ch. The question, however, will always be whether the conditions of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (2), are fulfilled in any particular case, and this is a question of construction in which decided cases are of little use.

framed as to comprise several insurances; for instance, £1,000 may be insured on sugars and £500 on wheat in the same policy, or the sugars may be valued in the policy at £1,000 and the wheat at £500; in such cases each interest may be separately abandoned (*a*).

(ii.) *Time when Notice must be Given.*

Time when notice of abandonment must be given

964. Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry (*b*).

If the assured receives intelligence of a loss, such as capture or arrest which is *primâ facie* a constructive total loss, the assured must give notice of abandonment immediately on receipt of the intelligence (*c*). But if the information be in itself doubtful, or if it leave it uncertain whether the loss or damage constitutes a *primâ facie* constructive total loss, he may wait in order to verify the intelligence or to ascertain the real extent of the loss (*d*).

Assured may by prosecuting the adventure lose his right of abandonment.

965. If the assured after receiving notice of a disaster which may give rise to a constructive total loss prosecutes the adventure, he cannot afterwards, when he has ascertained that the damage was such as would have entitled him to treat the loss as constructively total, give notice of abandonment. Thus, where the owners of a ship which was sea-damaged in a foreign port have elected to treat the loss as partial, they cannot afterwards turn it into a total loss by giving notice of abandonment merely because they find on the ship's arrival that she is not worth repairing (*e*).

Similarly, if the assured on receiving information that a disaster has occurred which amounts to a constructive total loss orders the

(*a*) Marshall on Marine Insurance, 4th ed., p. 486. Where a vessel is insured with different underwriters, each underwriter who accepts the notice of abandonment acquires an interest in the subject-matter insured or in its proceeds in the proportion which the amount subscribed by him bears to the full value; and the assured retains a like interest so far as he is not fully insured. See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 81; *The Commonwealth*, [1907] P. 216, C. A.; *Whitworth Brothers* v. *Shepherd* (1884), 12 R. (Ct. of Sess.) 204.

(*b*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (3).

(*c*) *Hunt* v. *Royal Exchange Assurance* (1816), 5 M. & S. 47; *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 467, 480, C. A.; *Allwood* v. *Henckell* (1795), 1 Park on Marine Insurance, 8th ed., p. 399; *Aldridge* v. *Bell* (1816), 1 Stark. 498; *Mullett* v. *Shedden* (1811), 13 East, 304; *Mellish* v. *Andrews* (1812), 15 East, 13. See the judgment of the Privy Council in *Currie & Co.* v. *Bombay Native Insurance Co.* (1869), L. R. 3 P. C. 72, at p. 79; *Hudson* v. *Harrison* (1821), 3 Brod. & Bing. 97, 106.

(*d*) *Gernon* v. *Royal Exchange Assurance Co.* (1815), 6 Taunt. 383, 387.

(*e*) *Fleming* v. *Smith* (1848), 1 H. L. Cas. 513; *Anderson* v. *Royal Exchange Assurance Co.* (1805), 7 East, 38; *Barker* v. *Blakes* (1808), 9 East, 283. In *Fleming* v. *Smith*, *supra*, the owners of the insured ship heard from the master that she had been obliged to put into Mauritius to refit, that extensive repairs were necessary, and that he intended to borrow money on bottomry. The owners wrote approving of this course. The ship was repaired, and some months afterwards arrived in England and was at first taken possession of by the agents of the owners. It was then found that the cost of repairs would much exceed her market value and the owners abandoned her to the underwriters. It was held by the House of Lords that the notice was too late.

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subject-matter insured to be sold, he cannot afterwards by virtue of giving notice of abandonment recover as for a total loss (*f*).

The assured may even lose his right to treat a loss as a constructive total loss through the master's unjustifiable delay in ascertaining whether or not the loss is total, the assured being thereby precluded from giving notice of abandonment to the underwriter within a reasonable time (*g*).

(iii.) *Acceptance of Notice.*

Acceptance of notice of abandonment.

966. The acceptance of a notice of abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance (*h*). The insurer has no right after receiving notice of abandonment, by salving the subject-matter insured, to claim that he has reduced the total loss to a partial loss (*i*). On the contrary, if after receiving the notice he does any act which would only be justified under a right derived from it, he will be estopped from denying that he has accepted the notice (*j*). Moreover, such conduct on his part may, where no notice of abandonment has been given, preclude him from denying that he has waived his right to such notice (*k*).

Estoppel.

Effect of acceptance and non-acceptance of the notice of abandonment.

967. Where notice of abandonment is accepted either expressly or impliedly the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice (*l*).

If the notice of abandonment be not accepted, it is defeasible, either by the subsequent restoration of the insured property, or by acts showing that the assured has treated the loss as partial and not total (*m*). But where the notice has been properly given the rights of the assured are not prejudiced by a refusal to accept it (*n*).

Capacity of master: (i.) After notice;

968. In general the master after notice of abandonment has been given acts for the benefit of all concerned in dealing with the subject-matter insured, but where it clearly appears that he has been acting under the directions or for the benefit of the assured exclusively and not for the benefit of the underwriters, the assured may thereby forfeit his right to insist on the notice of abandonment, or be deemed to have impliedly withdrawn it (*o*). It must, however,

(*f*) *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 467, C. A.

(*g*) *Potter* v. *Campbell* (1868), 16 W. R. 401; also referred to in *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83, 117, 119, 123.

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (5); *Smith* v. *Robertson* (1814), 2 Dow, 474, H. L.; *Hudson* v. *Harrison* (1821), 3 Brod. & Bing. 97; *Thelluson* v. *Fletcher* (1793), 1 Esp. 73.

(*i*) *Sailing Ship "Blairmore" Co.* v. *Macredie*, [1898] A. C. 593.

(*j*) *Provincial Insurance Co. of Canada* v. *Leduc* (1874), L. R. 6 P. C. 224; *Shepherd* v. *Henderson* (1881), 7 App. Cas. 49; and see title ESTOPPEL, Vol. XIII., p. 397.

(*k*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (8), and cases cited in note (*j*), *supra.*

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (6); *Smith* v. *Robertson, supra.*

(*m*) As to restoration of insured property, see, however, pp. 479 *et seq.*, *ante.*

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (4).

(*o*) *Fleming* v. *Smith* (1848), 1 H. L. Cas. 513; compare *Shepherd* v. *Henderson, supra.*

be borne in mind that under the suing and labouring clause the master is, notwithstanding the notice of abandonment, authorised to take all necessary steps for the safeguard and preservation of the subject-matter of the insurance, and further that he may in case of necessity sell the property and thereby turn the constructive into an actual total loss (*p*).

(ii.) Before notice

The master until notice of abandonment has been given acts *primâ facie* as agent of the assured. Thus if a captured ship be repurchased by the master in cases where no notice of abandonment is given he acts as agent for the owner, and if he does so within the scope of his implied authority the assured will be precluded from recovering for a total loss (*q*).

But where notice of abandonment has been given and accepted, or has become effectual, all the acts of the master for the preservation of the insured property from the time of the disaster are deemed to have been done on behalf of the underwriters (*r*).

(iv.) *Effect of Valid Abandonment.*

Effect of valid abandonment.

969. Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto (*s*).

Rights of insurer of ship.

Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss (*t*).

If the insured ship is abandoned during the voyage, but nevertheless succeeds in completing it so far as to earn freight, such freight does not belong either to the shipowner or to the underwriter on freight, but, after deducting the expenses of earning it incurred after the casualty, belongs to the underwriter on ship (*a*). The latter, however, is entitled only to the net freight

(*p*) As to the conversion of a constructive into an actual total loss, see p. 476, *ante*. See *Brown* v. *Smith* (1813), 1 Dow, 349, H. L.; *Allen* v. *Sugrue* (1828), Dan. & Ll. 188, 190, n. (a); *Stewart* v. *Greenock Marine Insurance Co.* (1848), 2 H. L. Cas. 159.

(*q*) *M'Masters* v. *Schoolbred* (1794), 1 Esp. 237; *Wilson* v. *Forster* (1815), 6 Taunt. 25.

(*r*) See the American cases cited in Arnould on Marine Insurance, ss. 1219, 1220.

(*s*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 63 (1).

(*t*) *Ibid.*, s. 63 (2). The insurer of a ship is not entitled under this clause to freight for the carriage of the goods to the place of the casualty (*Miller* v. *Woodfall* (1857), 8 E. & B. 493); see note (*a*), *infra*.

(*a*) *Case* v. *Davidson* (1816), 5 M. & S. 79; affirmed, *sub nom. Davidson* v. *Case* (1820), 2 Brod. & Bing 379, Ex. Ch.; *Stewart* v. *Greenock Marine Insurance Co.*, *supra*; *Sea Insurance Co.* v. *Hadden* (1884), 13 Q. B. D. 706, 711, C. A.; *The Red Sea*, [1896] P. 20, 24, C. A. But underwriters on freight may be entitled to receive from the shipowner *pro ratâ* freight paid to him for carriage of the goods to the place of the casualty (*London Assurance Corporation* v. *Williams* (1892), 9 T. L. R. 96, affirmed, without comment (1893), 9 T. L. R. 257, C. A.)

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earned by the insured ship, and not to that which may be earned by a subsequent ship (*b*). Nor is he entitled to receive freight paid in advance by a charterer, inasmuch as the shipowner is entitled to such freight whether the voyage be subsequently completed or not. Similarly, he is not entitled to the excess of the bill of lading freight over the chartered freight, inasmuch as such excess belongs to the charterer and not to the shipowner; moreover, from the charterparty freight receivable by the underwriters there must be deducted the freight's proportion of general average and particular charges, but not expenses incurred in respect of freight earned on the voyage prior to the abandonment (*c*).

Transfer of assurer's liability.

970. When once a valid notice of abandonment has been given, the assured cease to be owners and are released from all liability attaching to ownership which may have accrued since the loss (*d*).

On the other hand, if the underwriter on abandonment to him takes over the interest of the assured in the insured ship, he must bear all the liabilities to which the owner would have been subject except such as accrued before the casualty took place and did not arise from perils insured against (*e*).

From the language of the Act (*f*) it may be argued that, although there is a valid notice of abandonment, the underwriter, unless, at any rate, he actually accepts the notice, is not bound to take over the abandoned property, and may refuse to do so and thereby free himself from all liability; but the point has not yet been decided, and is one of doubt and difficulty (*g*).

Apportionment of salvage on abandonment.

971. Upon abandonment each of the insurers, if the assured is fully insured, is entitled to share in the proceeds of the salvage according to the proportion which the amount underwritten by him bears to the whole value of the thing insured, and this without regard to the date of the different subscriptions or the priority of the policies if more than one. Moreover, if the assured be not fully insured, he is entitled to share in such proceeds in the proportion to which he is uninsured (*h*).

SECT. 16.—*Subrogation.*

Subrogation. The general principle.

972. Marine insurance being a contract of indemnity, it follows that the so-called principle of subrogation applies to it. According

(*b*) *Hickie* v. *Rodocanachi* (1859), 28 L. J. (EX.) 273.

(*c*) *The Red Sea*, [1896] P. 20, C. A.

(*d*) *Barraclough* v. *Brown* (1896), 1 Com. Cas. 262, 329, C. A.; (1897), 2 Com. Cas. 249, H. L.; S. C., [1897] A. C. 615; *Arrow Shipping Co.* v. *Tyne Improvement Commissioners, The "Crystal,"* [1894] A. C. 508.

(*e*) *Sharp* v. *Gladstone* (1805), 7 East, 24; *Barclay* v. *Stirling* (1816), 5 M. & S. 6; *Sea Insurance Co.* v. *Hadden* (1884), 13 Q. B. D. 706, C. A. As to whether the underwriter on goods to whom they are duly abandoned takes them subject to the shipowner's claim for freight, see *Baillie* v. *Moudigliani* (1785), 1 Park on Marine Insurance, 8th ed., p. 116, and the American cases cited in Arnould on Marine Insurance, s. 1211, and compare them with Phillips, Law of Insurance, 5th ed., s. 1211.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 63 (1); see p. 489, *ante*.

(*g*) See *Stewart* v. *Greenock Insurance Co.* (1848), 2 H. L. Cas. 183, *per* Lord COTTENHAM; and Phillips, Law of Insurance, 5th ed., ss. 1726, 1727.

(*h*) See *The Commonwealth*, [1907] P. 216, C. A. As to the salvage arising

to this principle the insurer who has agreed to indemnify the assured will, on making good the loss, be entitled to succeed to all the ways and means by which the latter might have protected himself against, or reimbursed himself for, the loss (*i*).

Effect upon liability of insurer.

Therefore, when a loss happens, anything which reduces or diminishes that loss, reduces or diminishes the amount the insurer is bound to pay; and if the insurer has already paid the full loss, then if anything which diminishes the loss afterwards comes into the hands of the assured, the insurer is equitably entitled to be recouped to the extent of the benefit so received (*j*).

Illustration of principal.

The principle of subrogation may be illustrated as follows: If two ships A. and B. come into collision, and the collision is due to the negligence of those in charge of B., the owner of A., who has insured her, can recover the amount of his loss from the owner of B., and the latter cannot resist the claim on the ground that the owner of A. was entitled to recover or even had already recovered from his underwriters. If he has recovered his loss from the owner of B., he will be compelled to account to the underwriters for the money he has so received, and his claim against them will be *pro tanto* reduced or, if he has recovered a complete indemnity, extinguished (*k*). The owner of A. may, however, in the first instance recover his loss from the underwriters, and in such case they will be subrogated to his right to recover the loss from the owner of B. (*l*).

Extent of right.

As between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and

from a sum received from a tortfeasor, who caused the loss, see also *Duus Brown & Co.* v. *Binning* (1906), 11 Com. Cas. 190, and *The Welsh Girl* (1906), 22 T. L. R. 475 (where the owners of the insured ship being under-insured and therefore their own insurers to a certain amount were held entitled to share proportionately the moneys recovered by them against the tortfeasor who had occasioned the loss). There may, of course, be liens on the salvage which take precedence of the right of the underwriter, such, for instance, as the *jus ad rem* acquired by the holder of a bottomry bond (*Stephens* v. *Broomfield, The "Great Pacific"* (1869), L. R. 2 P. C. 516); and see title SHIPPING AND NAVIGATION. As to the general result of the assured not being fully assured, see p. 463, *ante*.

(*i*) *Simpson* v. *Thomson* (1877), 3 App. Cas. 279, *per* Lord CAIRNS, L.C., at p. 284. See also titles EQUITY, Vol. XIII., p. 149; GUARANTEE, Vol. XV., p. 509.

(*j*) See *Burnand* v *Rodocanachi* (1882), 7 App. Cas. 333, *per* Lord BLACKBURN, at p. 339; see also *Darrell* v. *Tibbitts* (1880), 5 Q. B. D. 560, C. A., and the judgments in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A. (where the principle of subrogation is elaborately explained).

(*k*) Although he is bound to account to the underwriters for the money received, he does not hold it as trustee for the latter (*Stearns* v. *Village Main Reef Gold Mining Co.* (1905), 10 Com. Cas. 89, C. A., applying the principle of *Randal* v. *Cockran* (1748), 1 Ves. Sen. 98).

(*l*) For another striking illustration of the proposition that the underwriter is subrogated to the rights of the assured as regards his remedy for tort, see *Assicurazioni Generali de Trieste* v. *Empress Assurance Corporation, Ltd.*, [1907] 2 K. B. 814; see also *The Commonwealth*, [1907] P. 216, C. A.; *The Welsh Girl, supra*; *The Charlotte*, [1908] P. 206, C. A.

SECT. 16. Subrogation.

whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured can be or has been diminished (*m*).

It follows also from the principle of subrogation that if the assured should renounce any of his rights and remedies against third parties to which, but for such renunciation, the insurers would have been subrogated, the assured will have to answer to the insurers for the full value of the rights so renounced. In short the insurer, on payment of the loss, is entitled to the advantage of every right of the assured, whether such right consists in contract or in remedy for tort, or to anything he has received or is entitled to receive in diminution of the loss (*n*).

Distinction between subrogation and rights arising on abandonment.

973. The rights given by subrogation must be distinguished from those resulting from abandonment in a case of total loss. The insurers, by virtue of the abandonment, become entitled to the property in the thing insured and to all rights incident to such property; whereas, by subrogation, they become entitled to rights and remedies which may not depend upon the ownership of the thing insured. Thus, where the owners of an insured ship have been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is paid. For instance, the right to receive payment of freight accruing due, but not earned, at the time of the disaster, is one of those rights incident to the property in the ship, and it therefore passes to the underwriters on abandonment. But the right of the assured to recover damages from a third person is not one of those rights which are incidental to the property in the ship. It passes therefrom to the underwriters in case of payment for a total loss, only on the principle of subrogation; and it is on this principle that it passes likewise to the underwriters who have satisfied a claim for a partial loss (*o*).

(*m*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A., *per* BRETT, L.J., at p. 388.

(*n*) *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 266, C. A. The assured may give the third party a release subject to the insurer's rights of subrogation; but a release given to a third party by one who has already to the knowledge of the third party received payment from his insurers will be deemed to be in fraud of the insurer's rights and consequently void. It was decided in *King* v. *Victoria Insurance Co.*, [1896] A. C. 250, P. C., that payment honestly made by insurers in satisfaction of a claim by the assured entitles the insurers to the remedies available to the assured, although the payment was not within the terms of the policy.

(*o*) *Simpson* v. *Thomson* (1877), 3 App. Cas. 279, *per* Lord BLACKBURN, at p. 292; *North of England Insurance Association* v. *Armstrong* (1870), L. R. 5 Q. B. 244, is a case which has been much commented on, both in Arnould on Marine Insurance, s. 1228, and by Lord BLACKBURN and Lord SELBORNE in *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 333. In that case the ship was sunk in a collision and became an absolute total loss, so that there was nothing to abandon. The case was, therefore, one of subrogation and not of abandonment. The decision itself presents no difficulty, but there are certain *obiter dicta* in the judgments which seem to assume that by virtue of subrogation it might be possible for the insurer to recover more than the amount of the loss he has paid. It is submitted that, if this be the meaning of such *dicta*, they are erroneous.

Conditions limiting the principle of subrogation.

974. The principle of subrogation is, however, in its application, limited or qualified by the following conditions:—

(1) The underwriter is entitled only to those remedies, rights, or other advantages which are available to the assured himself. Thus, if two ships A. and B. are the property of the same owner, and A. is sunk by the negligence of those in charge of B., the underwriters on A., having paid as for a total loss, have no claim upon the owner of A., inasmuch as the owner could not be answerable in damages to himself (*p*).

(2) The underwriter is subrogated to no rights but those possessed by the assured in respect of the thing to which the contract of insurance relates. Thus, where a vessel is damaged by collision, and her owners recover from those by whose negligence it was caused damages in respect of matters which are not covered by a policy on the ship, *e.g.*, demurrage or freight, the underwriters cannot, on paying for a total loss, claim from the assured the amount of those damages (*q*).

(3) It is only on payment of the whole of the loss sustained by the assured, whether total or partial, that the insurer is entitled to be subrogated to his rights of action, so that if the amount insured is less than the amount of such loss, the insurers, though they have paid the amount insured, will not be subrogated to those rights. Therefore the assured remains *dominus litis* in an action brought by him against the person primarily liable, and will be entitled to compromise the action without the assent of the insurers, provided always he acts *bonâ fide*, without any intention to sacrifice their interests (*r*).

(4) The advantages to which the insurers by subrogation succeed include any payment made in diminution of the loss in respect of which the insurers are liable, and are not confined to those which the assured has a right to demand; but they do not include benefits in the nature of a voluntary gift which he may have received from a third party, if those benefits were intended to be received by him for his own use alone and not to accrue to the underwriter (*s*).

and are inconsistent with the essential principle of subrogation as well as with the judgment in *Sea Insurance Co.* v. *Hadden* (1884), 13 Q. B. D. 706, C. A.; see also *The Commonwealth*, [1907] P. 216, C. A.; *The Welsh Girl* (1906), 22 T. L. R. 475.

(*p*) *Simpson* v. *Thomson* (1877), 3 App. Cas. 279, *per* Lord CAIRNS, L.C., at p. 284, *per* Lord PENZANCE, at p. 288.

(*q*) *Sea Insurance Co.* v. *Hadden*, *supra*, see *per* LINDLEY, L.J., at p. 718. Where a vess is partially damaged by a collision the underwriter is entitled to deduct from the cost of repairs one-third new for old (see p. 467, *ante*), whereas the tortfeasor has no right to make any such deduction. The practice in such a case is to divide the amount recovered from the wrong-doer rateably between the owners and the insurers; thus the owner retains all damages awarded to him in respect of demurrage, and also the money paid in respect of the thirds, the underwriter retaining such portion of the damages as are attributable to the two-thirds which he has paid.

(*r*) *Commercial Union Assurance Co.* v. *Lister* (1874), 9 Ch. App. 483. This was a case of a fire policy, but the principle of the decision applies equally to marine insurance. Of course the insurer will be ultimately entitled to secure any sum which the assured may altogether have received in excess of the amount of his loss.

(*s*) *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 333, explained in *Stearns* v.

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(5) The application of the principle of subrogation may be excluded by the terms of the policy of insurance or by any usage of trade to which it is subject (*t*).

Where the same property is insured by persons having different interests in it.

975. It often occurs that the same property is insured by persons who have different interests in it. For example, the owner, the common carrier or other bailee of goods, the mortgagor and mortgagee, may insure the same property with different insurers, and in such cases somewhat difficult questions arise between the various insurers as to their respective rights and liabilities between themselves. The answer to such questions is to be found by the correct application of the two principles of subrogation and contribution. The cases in which one or the other of those two principles are to be applied has been judicially explained in the following manner (*u*).

If a third party (a bailee of the goods, or, indeed, any other person) is liable in contract or tort for the loss of the goods or for damage to them, the company (or other person) which has insured the owner is subrogated to his rights against the third party, and it follows that the company (or other person) with which that third party may have insured will be ultimately liable for the loss, and cannot recover any contribution from the other companies.

Where different persons insure the same property in respect of their different rights, they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a bailor and bailee, mortgagor and mortgagee. Then if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their own interests, and, of course, those values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insure in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee. Wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons, and, therefore, it must be that if both recover the full value of the property from their respective insurers, the company which has insured the person who has the remedy over is subrogated to that remedy.

976. The Act (*x*) contains certain provisions relating to

Village Main Reef Gold Mining Co. (1905), 10 Com. Cas. 89, C. A., in a manner inconsistent with the explanation of BRETT, L.J., in *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A., at p. 391.

(*t*) *Tate* v. *Hyslop* (1885), 15 Q. B. D. 368, C. A.

(*u*) *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569, C. A., *per* MELLISH, L.J., at p. 583. This was the case of a fire policy, but the principles laid down in the judgment apply equally to marine insurance. As to fire insurance, see pp. 516 *et seq.*, *post.*

(*x*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 79.

subrogation, which are set out below (*a*). It is submitted that though the language used is, perhaps, not perfectly precise, those provisions are consistent with, and do not in any way alter, the previously existing law on the subject, as above set forth in this section (*b*).

The provisions of the Act as to subrogation.

SECT. 17.—*Recovery of Losses by Assured.*

SUB-SECT. 1.—*Settlement of Losses.*

Effect of settling losses or adjusting the policy.

977. When a claim arises under a policy, the assured's broker, having ascertained the percentage of the loss, according to the usual practice, indorses the percentage on the policy with the word "settled" prefixed, and calls upon the underwriter to initial the indorsement. When the indorsement is initialled, the claim is said to be "settled" or the policy "adjusted." This settlement or adjustment amounts to an acknowledgment by the underwriter of his liability and an implied promise by him to pay the indorsed percentage, but it is only an accord without satisfaction, and the only consideration is the underwriter's liability for the loss. It follows, therefore, from the ordinary principles of the common law that the underwriter is not precluded from disputing his liability and showing there is no consideration for the implied promise, even though at the time of adjustment he had full means of knowledge (*c*).

Where the adjustment has been followed by payment.

978. If, however, after adjustment the underwriter pays the loss, he cannot recover it back unless it was paid under a mistake of fact (*d*).

Moreover, where the loss is total at the time of adjustment and is paid by the underwriter under no mistake of fact, the money cannot be recovered back by him on the ground that the constructive total loss has subsequently been adeemed (*e*).

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 79:—(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

(*b*) See p. 490, *ante*, and the text, *supra*.

(*c*) See Lord CAMPBELL'S note to *Shepherd* v. *Cheiwter* (1808), 1 Camp. 273, 276; *Steel* v. *Lacy* (1810), 3 Taunt. 285; *Reyner* v. *Hall* (1813), 4 Taunt. 725; *Luckie* v. *Bushby* (1853), 13 C. B. 864; and see *Kelly* v. *Solari* (1841), 9 M. & W. 54, and title CONTRACT, Vol. VII., pp. 441, 442.

(*d*) *Bilbie* v. *Lumley* (1802), 2 East, 469; *Cadaval* (*Duke*) v. *Collins* (1836), 4 Ad. & El. 858, *per* PATTESON, J., at p. 866. See the notes to *Marriot* v. *Hampton* (1797), 2 Smith, L. C., 11th ed., 421, 437—440. As to the liability to a penalty for paying loss on an unstamped policy, see p. 338, *ante*. As to mistake generally, see title MISTAKE.

(*e*) *Da Costa* v. *Firth* (1766), 4 Burr. 1966; and see *Blaauwpot* v. *Da Costa* (1758), 1 Eden, 130; *Brooks* v. *MacDonnell* (1835), 1 Y. & C. (EX.) 500; *Tunno* v. *Edwards* (1810), 12 East, 488; *Goldsmid* v. *Gillies* (1813), 4 Taunt. 803. As to ademption of loss, see p. 479, *ante*.

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On the other hand, if after a loss has been paid the underwriter discovers that there was fraud or misrepresentation, or concealment or any other fact previously unknown to him, which would have afforded a good defence to the claim, he can recover the money so paid from the assured, or from the broker who has effected the policy, unless the latter has actually paid over the loss to the assured (*f*), or accounted to him for the amount received under circumstances amounting to payment (*g*). If the broker has merely passed the moneys received to the credit of the assured in such circumstances that the account remains open, then it can be recovered from him, unless he has been induced by the conduct of the insurer to alter his legal position (*h*). It follows also from the ordinary principles of the common law that if payments of losses have been made under compulsion of legal process, though under a mistake of fact, the money so paid cannot be recovered back unless there has been such fraud as would enable the insurer to set aside the judgment or the process of the court (*i*).

Where the underwriter does not resist the claim upon a policy which is void for illegality, but pays the loss to the broker of the assured, the latter is entitled to recover from the broker the amount of the loss, inasmuch as he can prove that the money was paid to his use without alleging the illegality of the policy (*k*).

Recovery of salvage by underwriter.

979. After payment of a total loss the underwriter can recover the salvage or the proceeds of its sale from the assured (*l*), unless he be estopped from doing so, as, for instance, by having at the time of settling the loss paid less than the whole amount of insurance in full of all demands (*m*).

SUB-SECT. 2.—*Return of Premiums.*

(i.) *In General.*

Statutory provisions. Marine Insurance Act, 1906.

980. Where the premium, or a proportionate part thereof, is, by the Act (*n*), declared to be returnable—

(a) If already paid, it may be recovered by the assured from the insurer; and

(*f*) *Buller* v. *Harrison* (1777), 2 Cowp. 565. As to misrepresentation generally, see title MISREPRESENTATION AND FRAUD.

(*g*) *Holland* v. *Russell* (1863), 4 B. & S. 14, Ex. Ch. As to accounting which amounts to payment, see p. 353, *ante*. See also titles AGENCY, Vol. I., p. 223; CONTRACT, Vol. VII., p. 479.

(*h*) *Buller* v. *Harrison*, *supra*; explained in *Holland* v. *Russell* (1861), 1 B. & S. 424, 435; affirmed (1863), 4 B. & S. 14, Ex. Ch. See also title AGENCY, Vol. I., p. 223.

(*i*) See *Marriot* v. *Hampton* (1797), 7 Term Rep. 269, and the notes thereto in 2 Smith, L. C., 11th ed., p. 421. See also title CONTRACT, Vol. VII., p. 488.

(*k*) *Tenant* v. *Elliott* (1797), 1 Bos. & P. 3; compare *Farmer* v. *Russell* (1798), 1 Bos. & P. 296; *Bousfield* v. *Wilson* (1846), 16 L. J. (EX.) 44; and see title AGENCY, Vol. I., p. 187. As to the effect of illegality on the right to a return of premium, see p. 501, *post*.

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 79; *Roux* v. *Salvador* (1836), 3 Bing. (N. C.) 266, 288, Ex. Ch.

(*m*) *Brooks* v. *MacDonnell* (1835), 1 Y. & C. (EX.) 500.

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (a), (c); see the text, *infra*, and p. 497, *post*. It is open to question whether the Act in dealing with return of premiums did not in some particulars alter the law (see p. 502, *post*).

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(b) If unpaid, it may be retained by the assured or his agent (*o*).

Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured (*p*). Stipulation for return contained in policy.

Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured (*q*). Total failure of consideration.

Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured (*r*). Total failure of apportionable part of consideration

In particular—

(a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable (*a*): Where policy is void.

(b) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable: Provided that where the subject-matter has been insured "lost or not lost" (*b*) and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival (*c*); Where subject-matter has never been imperilled.

(c) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering (*d*); Where assured has no insurable interest during risk.

(d) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable (*e*); Or a defeasible interest.

(e) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable (*f*); Over-insurance.

(f) Subject to the foregoing provisions, where the assured has over-insured by double insurance (*g*), a proportionate part of the several premiums is returnable: provided that, if Over-insurance by double insurance.

(*o*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 82.
(*p*) *Ibid.*, s. 83.
(*q*) *Ibid.*, s. 84 (1).
(*r*) *Ibid.*, s. 84 (2).
(*a*) *Ibid.*, s. 84 (3) (a).
(*b*) For the meaning of the expression "lost or not lost," see p. 367, *ante*.
(*c*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (b). Compare *ibid.*, s. 6 (1), Sched. I., r. 1, p. 368, *ante*.
(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (c). See further, as to gaming and wagering policies, p. 377, *post*.
(*e*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (d).
(*f*) *Ibid.*, s. 84 (3) (e).
(*g*) As to double insurance, see p. 380, *ante*, and p. 500, *post*.

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the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable (*h*).

(ii.) *Express Stipulations as to Return of Premium.*

Express stipulations as to return of premiums.

981. As has been seen above (*i*), the parties are at liberty to stipulate that the happening of any specified event should entitle the assured to a return of a certain portion of the premium (*k*); and the policy often contains an express clause to that effect. For instance, a clause was frequently inserted in a policy that in case the ship sails "with convoy and arrives," part of the premium should be returned (*l*). It is now also usual to insert a clause in time policies stipulating for the reduction of premium in the event of the vessel not being continuously employed during the whole of the insured period (*m*).

(iii.) *Return for Failure of Consideration.*

(a) *Total Failure.*

Apportionment of premium.

982. As regards the above-mentioned statutory provisions (*n*) relating to return of premium on failure of consideration, where no usage is proved to the contrary, and no express stipulation to the contrary is contained in the policy, an entire premium cannot be apportioned unless it can be implied from the contract that the parties had distinct risks in contemplation (*o*).

(*h*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (f).

(*i*) See p. 496, *ante*.

(*k*) See *Ionides* v. *Harford* (1859), 29 L. J. (EX.) 36.

(*l*) The object and meaning of this clause is fully explained by Lord MANSFIELD in *Simond* v. *Boydell* (1779), 1 Doug. (K. B.) 268, at pp. 270, 271; see also *Aguilar* v. *Rodgers* (1779), 7 Term Rep. 421; *Horncastle* v. *Haworth* (1806), Marshall on Marine Insurance, 4th ed., p. 539; *Kellner* v. *Le Mesurier* (1803), 4 East, 396; *Leevin* v. *Cormack* (1812), 4 Taunt. 483; *Dalgleish* v. *Brooke* (1812), 15 East, 295; *Langhorn* v. *Allnutt* (1812), 4 Taunt. 511; *Meyer* v. *Gregson* (1784), Marshall on Marine Insurance, 4th ed., p. 539; *Audley* v. *Duff* (1800), 2 Bos. & P. 111.

(*m*) As to the construction of such a clause, see *Hunter* v. *Wright* (1830), 10 B. & C. 714. As to the construction of a clause providing that if the vessel were sold or transferred to a new management the policy should become cancelled and a *pro ratâ* return of premium be made, see *Pyman* v. *Marten* (1907), 13 Com. Cas. 64, C. A. As to the construction of a clause providing for the return of a portion of the premium on the condition that the vessel should not be employed in certain specified trades or within a specified area, see *Gorsedd Steamship Co.* v. *Forbes* (1900), 5 Com. Cas. 413.

(*n*) See pp. 496, 497, *ante*.

(*o*) The following are very special cases in which the premium was held to be apportionable where the policy contained a warranty that the ship should depart with convoy for the voyage. They were at any rate decided to a very great extent upon the evidence of usage: *Stevenson* v. *Snow* (1761), 1 Wm. Bl. 318; *Burmon* v. *Woodbridge* (1781), 2 Doug. (K. B.) 781, 789; *Tyrie* v. *Fletcher* (1777), 2 Cowp. 666; *Gale* v. *Machell* (1785), Marshall on Marine Insurance, 4th ed., p. 529; *Long* v. *Allan* (1785), 4 Doug. (K. B.) 276; better reported *sub nom. Long* v. *Allen*, Marshall on Marine Insurance, 4th ed., p. 529. See also *Meyer* v. *Gregson* (1784), 3 Doug. (K. B.) 402; *Rothwell* v. *Cooke* (1797), 1 Bos. & P. 172.

Treatment of Marine Insurance Act, 1906, s. 84 (1), (3) (a), (b), (c), (d).

983. It will conduce to clearness if it be assumed in the first instance that the policy is a valid and legal policy, reserving for subsequent consideration (*p*) the effect of a policy being void or of there being fraud or illegality. In this and the immediately following paragraphs, therefore, the validity of the policy and the absence of fraud or illegality will throughout be assumed.

When total failure of consideration results.

The consideration for the payment of the premium is the risk which the underwriter takes upon himself. This consideration totally fails where from any cause no risk is incurred by the underwriter, as where the subject-matter insured has never been imperilled by reason of the policy not having attached (*q*). This may happen by reason of a breach of warranty, express or implied, as, for instance, where the ship is at the commencement of the risk unseaworthy (*r*); or it may occur where the ship does not sail on or before a certain day, or where the assured at the outset abandons the insured adventure (*s*), or where there is a concealment or misrepresentation (though not fraudulent) on the part of the assured, in consequence of which the underwriter repudiates the contract (*t*). In like manner the underwriter comes under no risk where throughout the currency of the risk the assured has no insurable interest (*a*).

In all these cases the consideration wholly fails, and, therefore, according to the ordinary principles of the common law, the premium, if it has been paid, can be recovered by the assured, and if it is unpaid it is not recoverable by the underwriter (*b*).

If policy has once attached, premium is not returnable.

984. On the other hand if, on the true construction of the policy, the risk be entire and indivisible, then, if the policy has once attached, there is no return of premium. For instance, if the insurance is "at and from," the premium is not returnable, though the ship be lost before sailing on the voyage (*c*). Upon the same

(*p*) See p. 501, *post*.

(*q*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (b) (see p. 497, *ante*); *Henkle* v. *Royal Exchange Assurance Co.* (1749), 1 Ves. Sen. 317; *Long* v. *Allen* (1785), Marshall on Marine Insurance, 4th ed., p. 529; *Colby* v. *Hunter* (1827), 3 C. & P. 7. As to attachment of risk, see Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Sched. I., Rules for Construction of Policy, 2—4; see pp. 384 *et seq.*

(*r*) See p. 422, *ante*.

(*s*) See pp. 396, 419, *ante*.

(*t*) *Feise* v. *Parkinson* (1812), 4 Taunt. 640; *Anderson* v. *Thornton* (1853), 8 Exch. 425. See *North-Eastern* 100A *Steamship Insurance Association* v. *Red "S" Steamship Co.* (1905), 10 Com. Cas. 245; affirmed (1906), 12 Com. Cas. 26, C. A. (where the ordinary rule as to return of premium was expressly excluded by the rules of the Mutual Assurance Association). As to the effect of such misrepresentation, see p. 404, *ante*.

(*a*) But after the assured on ship and freight had completed the voyage and earned freight, Lord ELLENBOROUGH ruled that he could not recover back the premium on the ground that he had no insurable interest by reason of want of title to the ship (*M'Culloch* v. *Royal Exchange Assurance Co.* (1813), 3 Camp. 406).

(*b*) Where the assured himself abandons the adventure he ought, it seems, to give notice to the underwriter before he brings his action to recover the premium (*Palyart* v. *Leckie* (1817), 6 M. & S. 290; *Gatty* v. *Field* (1846), 9 Q. B. 431). The premium, as has been already seen (see p. 349, *ante*), is not as a rule due from the assured, but from the broker, to the underwriter (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 53 (1)).

(*c*) *Moses* v. *Pratt* (1816), 4 Camp. 297; *Annen* v. *Woodman* (1810), 3 Taunt. 299. As to the meaning of "at and from," see p. 388, *ante*.

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principle, since a deviation, as distinguished from a change of the voyage, only discharges the underwriter from the time when the deviation actually commences (*d*), the assured is not entitled to a return of the premium in cases of deviation (*e*); and the termination of a defeasible interest does not entitle him to a return of premium (*f*).

Where loss occurs before the insurance is effected.

985. The proviso (*g*) for the case of an insurance "lost or not lost" is founded upon the consideration that in such a case the underwriter has taken upon himself the risk of the property being lost before the conclusion of the contract (*h*).

Where part only of subject-matter imperilled.

986. Where part only of the subject-matter insured is imperilled, a proportionate part of the premium is returnable (*i*). Thus, if a hundred bales of cotton be insured and only fifty bales are put on board, a return of half the premium must be made for short interest. Similarly if the freight of a full cargo is insured and at the time of the loss a complete cargo is not at risk, there must be a proportionate return of premium (*i*).

(b) *Partial Failure of Consideration: Over-insurance.*

Return of premium in case of over-insurance on an unvalued policy.

987. If the assured has under an unvalued policy insured to the amount of £1,000 and the property at risk is only of the value of £750, one-fourth of the premium is returnable, because the underwriter could never be liable for more than three-fourths of the value of the amount insured (*k*).

Where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable (*l*), subject to the statutory provisions already noticed (*m*).

The principle on which the clauses as to over-insurance and double insurance (*n*) are founded is that if the risk in consideration of which the underwriter is paid the premium is not in fact incurred by him, or is not incurred to the full extent contemplated, there is

(*d*) See p. 396, *ante*.

(*e*) *Hogg* v. *Horner* (1797), 2 Park on Marine Insurance, 8th ed., p. 782; *Tait* v. *Levi* (1811), 14 East, 481; *Tyrie* v. *Fletcher* (1777), 2 Cowp. 666; *Loraine* v. *Thomlinson* (1781), 2 Doug. (K. B.) 585; *Bermon* v. *Woodbridge* (1781), 2 Doug. (K. B.) 781.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (d) (see p. 497, *ante*); *Boehm* v. *Bell* (1799), 8 Term Rep. 154.

(*g*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (b); see p. 497, *ante*.

(*h*) *Bradford* v. *Symondson* (1881), 7 Q. B. D. 456, C. A.; *Natusch* v. *Hendewerk* (1871), 7 Q. B. D. 460, n.

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (b); see p. 497, *ante*.

(*j*) *Forbes* v. *Aspinall* (1811), 13 East, 323 (freight); *Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651; *Tobin* v. *Harford* (1864), 34 L. J. (C. P.) 37, Ex. Ch. (cargo), afford examples of short interest, but no question of return of premium was there discussed; compare *Eyre* v. *Glover* (1812), 16 East, 218 (profits).

(*k*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (e); and p. 497, *ante*.

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (f); see p. 497, *ante*.

(*m*) See p. 497, *ante*.

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (e), (f); see p. 497, *ante*.

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a failure of consideration in whole or in part in respect of which the insurer must return the premium or part of it.

Where the over-insurance is by a single policy all the underwriters contribute rateably to the return of premium without regard to the date of their subscriptions (*o*). If there are several policies on the same subject-matter and the sum insured exceeds the value of the subject-matter, all the underwriters on the several policies are liable to pay according to their respective subscriptions, and are therefore bound to make a return of premium for the excess of the sum insured over the value of the subject-matter in proportion to their respective subscriptions (*o*).

Over-insurance by single policy.

Over-insurance by several policies.

Before the Act (*p*) came into force there was an exception to the rule as to double insurance, that if any policy had borne the entire risk before the later policies were effected, no premium was returnable in respect of that policy; and to this extent the statutory proviso already mentioned (*q*) embodies the law as it existed (*r*) before the passing of the Act (*s*). The further exceptions contained in the same proviso (*q*) are new.

These rules of law relating to double insurances do not prevail on the Continent. American policies generally contain express provisions on the subject (*t*).

(iv.) *Where Policy is Avoided by Material Alteration.*

988. Where a policy was avoided by reason of a material alteration when in the custody of the assured or his agent, the law, before the passing of the Act (*u*), was that the premium was not returnable (*v*). It will have to be decided whether the express words of the statutory provision already noticed (*w*) do not make the premium returnable in a case where the policy is so avoided before the risk has attached, inasmuch as the principal, if not the only, case in which a policy is void, where not a wagering policy, and where there is no illegality, is where it is made void by a material alteration (*x*).

As to return of premium where policy is void on the ground of alteration.

(v.) *Effect of Fraud and Illegality.*

989. Where the underwriter has been induced to enter into the contract of insurance by the fraud of the assured or his agent and the policy is avoided by the insurer, the assured cannot recover the premium (*y*). On the other hand, where the assured has been

As to return of premium in case of fraud.

(*o*) Marshall on Marine Insurance, 4th ed., p. 516.

(*p*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), which came into force on 1st January, 1907.

(*q*) *Ibid.*, s. 84 (3) (f); see pp. 497, 498, *ante*.

(*r*) See *Fisk* v. *Masterman* (1841), 8 M. & W. 165.

(*s*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41); see note (*p*), *supra*.

(*t*) See Arnould on Marine Insurance, s. 1262.

(*u*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41); see note (*p*), *supra*.

(*v*) *Langhorn* v. *Cologan* (1812), 4 Taunt. 330.

(*w*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (a); see p. 497, *ante*.

(*x*) See p. 402, *ante*.

(*y*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (a); *Rivaz* v. *Gerussi* (1880), 6 Q. B. D. 222, C. A.; *Tyler* v. *Horne* (1785), Marshall on Marine

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induced to enter into the contract by the fraud of the underwriter, and consequently repudiates the contract, the premium must be returned (*z*).

Where the policy is effected by way of gaming or wagering the premium is not returnable (*a*).

Or on gaming and wagering policy.

Effect of illegality of policy.

990. According to the principles of the common law, if the policy was void on the ground of its being illegal and the assured withdrew from the contract before the policy had attached, then the assured could, on giving the underwriter notice of such withdrawal (*b*), recover the premium. He would be entitled to do so because he could prove failure of consideration without relying on or alleging the illegality of the policy (*c*). It seems, however, that this rule of law, which has been strongly questioned by eminent judges, is no longer applicable to marine insurance, and that whether or not the policy has attached, the premium is not returnable if the policy is void by reason of illegality (*d*).

SUB-SECT. 3.—*Practice and Evidence* (*e*).

Pleading.

991. Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss (*f*). But where the assured merely proves that the ship has sustained some damage without giving any evidence as to its extent, he can recover only nominal damages (*g*).

Where there is a general averment of interest in the entire

Insurance, 4th ed., p. 525; *Chapman* v. *Fraser* (1793), Marshall on Marine Insurance, 4th ed., p. 525.

(*z*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (b), proviso, and pp. 404, 497, *ante;* and see *Duffell* v. *Wilson* (1808), 1 Camp. 401; *Kettlewell* v. *Refuge Assurance Co.*, [1907] 2 K. B. 242; affirmed, [1908] 1 K. B. 545, C. A.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (a), (c). See also Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. 7, c. 12).

(*b*) *Palyart* v. *Leckie* (1817), 6 M. & S. 290.

(*c*) *Lowry* v. *Bourdieu* (1780), 2 Doug. (K. B.) 468, *per* BULLER, J., at p. 471. See also *Tappenden* v. *Randall* (1801), 2 Bos. & P. 467; *Aubert* v. *Walsh* (1810), 3 Taunt. 277; *Taylor* v. *Bower* (1876), 1 Q. B. D. 291; *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123, C. A.

(*d*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 84 (3) (a). See *Morck* v. *Abel* (1802), 3 Bos. & P. 35; *Lubbock* v. *Potts* (1806), 7 East, 449. When the underwriter raises the defence of illegality the assured may recover the premium if when the policy was effected he was ignorant of the fact which rendered it illegal (*Oom* v. *Bruce* (1810), 12 East, 225; *Henry* v. *Staniforth* (1815), 4 Camp. 270; *sub nom. Hentig* v. *Staniforth* (1816), 5 M. & S. 122; *Siffken* v. *Allnutt* (1813), 1 M. & S. 39). As to the effect of misrepresentation by the insurer or his agent as to the legality of the insurance, see also *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K. B. 558; and, further, as to the general rule in all insurances, see p. 513, *post*.

(*e*) Pleadings now no longer present any difficulty, and it suffices to mention the three points mentioned in the text, *supra*. As to pleading in general, see Bullen and Leake, Precedents of Pleading, 6th ed.; and title PLEADING. As to evidence generally, see title EVIDENCE, Vol. XIII., pp. 415 *et seq.* As to discovery, inspection, and interrogatories generally, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 35 *et seq.*

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 56 (4); and see p. 476, *ante; Gardiner* v. *Croasdale* (1760), 2 Burr. 904.

(*g*) *Tanner* v. *Burnett* (1825), Ry. & M. 182.

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subject-matter insured, the plaintiff who proves an interest in part may recover *pro tanto* (*h*).

The court will prevent its process from being abused, and therefore will not allow the assured to recover the full amount of his loss in addition to the premium which he has received under a plea of payment into court (*i*).

Consolidation of actions.

The consolidation of actions on policies of marine insurance is provided for by the Rules of the Supreme Court, 1883 (*k*).

Discovery

992. The order for ship's papers made in actions on policies of marine insurance is far more extensive than the ordinary order for discovery of documents (*l*). This order will be made not only against the owner of an insured ship, but also against a mortgagee, though he has never been in possession of her. It will also be made against a nominal plaintiff who is the agent of the assured (*m*); against the assured on a policy on goods (*n*); and also against the underwriter claiming on a policy of reinsurance (*o*). But the order will not be made when the policy is one entirely for inland transit (*p*).

Evidence.

993. The rules of evidence applicable to policies of marine insurance are generally the same as those which apply to all other cases (*q*). Questions as to the materiality of matters concealed or represented, or as to what is reasonable diligence, reasonable time,

(*h*) *Rising* v. *Burnett* (1798), Marshall on Marine Insurance, 4th ed., p. 570; *Page* v. *Rogers* (1785), Marshall on Marine Insurance, 4th ed., p. 570.

(*i*) *Carr* v. *Royal Exchange Assurance Corporation, Carr* v. *Montefiore* (1864), 34 L. J. (Q. B.) 21. As to the person in whose name the action can be brought in case of assignment of moneys due under the policy, see *Swan and Cleland's Graving Dock and Slipway Co.* v. *Maritime Insurance Co. and Croshaw*, [1907] 1 K. B. 116.

(*k*) R. S. C., Ord. 49, r. 8. See title PRACTICE AND PROCEDURE; and the notes to the above rule in the Yearly Practice of the Supreme Court.

(*l*) See R. S. C., Appendix K, No. 19. As to the considerations on which the order for ship's papers is founded, see *China Steamship Co.* v. *Commercial Assurance Co.* (1881), 8 Q. B. D. 142, C. A., *per* BRETT, L.J., at p. 145; *West of England Bank* v. *Canton Insurance Co.* (1877), 2 Ex. D. 472; and see, generally, title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 65, 66.

(*m*) *West of England Bank* v. *Canton Insurance Co., supra.*

(*n*) *Willis & Co.* v. *Baddeley*, [1892] 2 Q. B. 324, C. A.

(*o*) *China Traders' Insurance Co.* v. *Royal Exchange Assurance Corporation*, [1898] 2 Q. B. 187, C. A.

(*p*) *Schloss Brothers* v. *Stevens* (1905), 10 Com. Cas. 224, C. A.; *Tannenbaum & Co.* v. *Heath* (1908), 13 Com. Cas. 264, C. A. It will be made where the policy is in substance a marine policy, though a part of the transit is by land (*Harding* v. *Bussell*, [1905] 2 K. B. 83, C. A., where the earlier cases, *Henderson* v. *Underwriting and Agency Association*, [1891] 1 Q. B. 557, and *Village Main Reef Gold Mining Co.* v. *Stearns* (1900), 5 Com. Cas. 246, were doubted). As to discovery where the action is brought in the name of the assured by the underwriter, who is subrogated to his rights, see *James Nelson & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd.*, [1906] 2 K. B. 217, C. A.

(*q*) See, generally, title EVIDENCE, Vol. XIII., pp. 415 *et seq.* As to the exceptional effect, in cases of loss by capture, given to the judgment by a foreign prize court and rendering it conclusive, not only as to the fact of condemnation, but also as to the grounds of it, see p. 422, *ante;* and titles CONFLICT OF LAWS, Vol. VI., p. 177 *et seq.;* ESTOPPEL, Vol. XIII., p. 340; PRIZE LAW AND JURISDICTION.

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or reasonable premium, are in cases of marine insurance, as already noticed, questions of fact and not of law (*r*).

Interest on amount of loss.

994. Juries are now authorised to give damages in the nature of interest in all actions on policies of marine insurance (*s*).

SECT. 18.—*Mutual Insurance Associations.*

SUB-SECT. 1.—*Origin of Mutual Insurance Clubs.*

Origin of mutual insurance clubs.

995. It has been already (*t*) shown that in 1719 two companies, the London Assurance Company and the Royal Exchange Assurance Company, were incorporated with the exclusive right of making marine insurances in their corporate capacity. This monopoly gave rise to shipowners' clubs for the mutual insurance of their own vessels. In such clubs each member is both assured and insurer; he is insured as to his own property in the club by all the other members in proportion to their respective properties in it, and he is at the same time an insurer in the proportion of his own property in the club for the property of each of the others, their mutual agreements being the consideration of the contract.

By reason of the monopoly of the two insurance companies above mentioned, it was essential to the legality of the mutual insurance clubs that their members should be liable individually only, each for his own proportion and not jointly, or one for others of them (*u*). Moreover, the managers of the club had no right of action against a member for premiums or for his contribution to losses paid (*a*).

SUB-SECT. 2.—*Registration under Companies Acts.*

Companies Act, 1862: its consequences.

996. The monopoly granted to the two insurance companies was taken away in 1824 (*b*), and thenceforth until 1862 no restriction was placed on the formation of mutual associations or joint stock companies to carry on the business of marine insurance. But the Companies Act, 1862 (*c*), produced the result that, as a marine insurance association is a company for the acquisition of gain within the meaning of that Act (*c*), it is, when consisting of more

(*r*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 18 (4), 88; see pp. 400, 405, *ante*.

(*s*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 29; and see title DAMAGES, Vol. X., p. 345.

(*t*) See p. 339, *ante*.

(*u*) See the judgment of POLLOCK, B., in *Marine Mutual Insurance Association* v. *Young* (1880), 43 L. T. 441; *Harrison* v. *Millar* (1796), 7 Term Rep. 340, n. cited in *Lees* v. *Smith* (1797), 7 Term Rep. 338; *Strong* v. *Harvey* (1825), 3 Bing. 304.

(*a*) *Gray* v. *Pearson* (1870), L. R. 5 C. P. 568; *Evans* v. *Hooper* (1875), 1 Q. B. D. 45, C. A. There was usually a rule in those clubs requiring the member whose ship or share was mortgaged to produce to the club a contract of guarantee from the mortgagee to answer for all demands that should be made on the member by the club, and this rule was generally so framed as to make the production of the guarantee a condition precedent to the recovery for a loss (*Hughes* v. *Tindall* (1856), 18 C. B. 98; *Turnbull* v. *Woolfe* (1862), 9 Jur. (N. S.) 57).

(*b*) Stat. (1824) 5 Geo. 4, c. 114.

(*c*) 25 & 26 Vict. c. 89, s. 4, repealed and re-enacted by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. (1) 2; see title COMPANIES, Vol. V. p. 44.

than twenty members, an illegal association unless registered as a company (*d*).

Mutual insurance associations are now, therefore, always registered under the Companies Acts (*e*), usually as a company limited by shares or as a company limited by guarantee (*f*).

SUB-SECT. 3.—*Legal Character.*

Legal character of mutual insurance associations.

997. In general, it is now the association itself which is the insurer, and the assured's right of action is against the association and not against the other members, the consideration or premium for the insurance being his liability to contribute to the losses of the other members and the expenses of the association (*g*). But in order that these contracts of mutual insurance may be valid it is necessary that there should be a properly stamped policy containing the particulars required by the Stamp Act, 1891 (*h*).

SUB-SECT. 4.—*Provisions of the Marine Insurance Act.*

Provisions of Marine Insurance Act, 1906.

998. Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance (*i*).

The provisions of the Act (*j*) relating to the premium (*k*) do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium (*l*).

The provisions of the Act (*j*), in so far as they may be modified by the agreement of the parties, may in the case of mutual

(*d*) *Re Arthur Average Association for British, Foreign, and Colonial Ships, Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542; also *Re Padstow Total Loss and Collision Assurance Association* (1883), 20 Ch. D. 137, 145—149, C. A.

(*e*) See note (*c*), p. 504, *ante*

(*f*) *Lion Insurance Association* v. *Tucker* (1883), 12 Q. B. D. 176, C. A.; *Marine Mutual Insurance Association* v. *Young* (1880), 43 L. T. 441. The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4, only applied to associations formed after the commencement of the Act, and accordingly it was held that a mutual marine insurance association formed in 1847 and reconstituted from year to year since that date was not illegal, though not registered nor incorporated (*May* v. *Jacobs* (1885), *Shipping Gazette*, Weekly Summary, 20th March).

(*g*) See *Lion Insurance Association* v. *Tucker*, *supra*, *per* BRETT, M.R., at p. 187; *North-Eastern* 100A *Steamship Insurance Association* v. *Red "S" Steamship Co.* (1906), 12 Com. Cas. 26. As to the extent to which a member of a mutual protection association limited by guarantee can be made a contributory in the case of its being wound up, see *Baird's Case*, [1899] 2 Ch. 593.

(*h*) 54 & 55 Vict. c. 39, s. 93; *Bromley* v. *Williams* (1863), 32 Beav. 177; *Smith's Case* (1869), 4 Ch. App. 611; *Re Arthur Average Association for British, Foreign, and Colonial Ships, Ex parte Hargrove & Co.*, *supra*. For the statutory provisions relating to the stamping of mutual insurance policies with additional stamps, see p. 338, *ante*. Before the passing of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), a mutual insurance policy was properly signed within the meaning of the Stamp Act, 1891 (54 & 55 Vict. c. 39), when sealed with the seal of the association and attested by the manager (*Marine Mutual Insurance Association* v. *Young*, *supra*). The Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 24 (1), now provides that in the case of a corporation the corporate seal may be a sufficient signature to a policy, but does not require this mode of subscription; and for stamps on policies generally, see p. 338, *ante*, and p. 507, *post*. For stamp duty generally, see title REVENUE.

(*i*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), 85 (1).

(*j*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41).

(*k*) For these provisions, see pp. 349 *et seq.*, *ante*.

(*l*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 85 (2).

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insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association (*m*).

Subject to the exceptions mentioned in this paragraph, the provisions of the Act (*n*) apply to a mutual insurance (*o*).

Risks insured against in mutual insurance associations.

999. Mutual insurances are made subject to the articles of association and to the rules and regulations thereof which are usually by express reference incorporated in the policy (*p*), and these generally contain some special clauses peculiar to mutual insurance associations. For instance, in insurances on freight there is often a rule or clause that the interest insured shall be the amount entered in the association, which amount shall be paid in the event of the total loss of the steamship entered (*q*).

Position of part owners not being members.

1000. The question sometimes arises, where mutual insurance associations are defendants or plaintiffs, whether there can be claims for losses or contributions by or against part owners of vessels insured other than members. This question depends in each case upon the particular rules of the association concerned, and the form of its policies, so that no general rules on the subject can be usefully laid down (*r*).

Similarly the question whether a rule incorporated in a policy of mutual insurance is a warranty, the non-compliance with which discharges the insurers, or is only an exception from the risks insured against, is a question of construction depending on the language of that rule and the nature of the risk to which it relates (*s*).

SUB-SECT. 5.—*Risks undertaken by Mutual Insurance Associations; Indemnity or Protection Associations.*

Insurance against loss not covered by ordinary policies.

1001. Most mutual associations insure against losses not covered by Lloyd's policy or ordinary policies, for instance, the loss arising

(*m*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 85 (3).

(*n*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41).

(*o*) *Ibid.*, s. 85 (4).

(*p*) *Muirhead* v. *Forth and North Sea Steamboat Mutual Insurance Association*, [1894] A. C. 72; *Blyth & Co.'s Case* (1872), L. R. 13 Eq. 529.

(*q*) See the *United Kingdom Mutual Steamship Assurance Association, Ltd.* v. *Boulton* (1898), 3 Com. Cas. 330.

(*r*) The following are cases on this subject:—*Montgomerie* v. *United Kingdom Mutual Steamship Association*, [1891] 1 Q. B. 370; *United Kingdom Mutual Steamship Assurance Association* v. *Nevill* (1887), 19 Q. B. D. 110, C. A.; *Great Britain* 100 *A1 Steamship Insurance Association* v. *Wyllie* (1889), 22 Q. B. D. 710, C. A.; *Ocean Iron Steamship Association* v. *Leslie* (1887), 22 Q. B. D. 722, n.; *British Marine Mutual Insurance Co.* v. *Jenkins*, [1900] 1 Q. B. 299.

(*s*) *Stewart* v. *Wilson* (1843), 12 M. & W. 11; *Sailing Ship Dewa Gungadhur Co.* v. *United Kingdom Mutual Insurance Association* (1886), 2 T. L. R. 366; *Williams* v. *British Mutual Marine Insurance Co.* (1887), 3 T. L. R. 314, C. A.; *Colledge* v. *Harty* (1851), 6 Exch. 205; *Harrison* v. *Douglas* (1835), 3 Ad. & El. 396. Club time policies often contain a rule that the policy shall be renewed on the expiration of the period for which it was originally issued, in the absence of ten days' notice to the contrary. As to whether this is a continuation clause (p. 382, *ante*) within the meaning of the definition in the Finance Act, 1901 (1 Edw. 7, c. 7), s. 11, see *Michael* v. *Gillespy* (1857), 2 C. B. (N. S.) 627; *Lishman* v. *Northern Maritime Insurance Co.* (1873), L. R. 8 C. P. 216; affirmed (1875), L. R. 10 C. P. 179, Ex. Ch. See further, as to such warranties and exceptions, pp. 416, 420, 443 *et seq.*, *ante*.

from the deduction one-third new for old, particular average losses on ship under 3 per cent., cost of wages and provisions of the crew while the ship is disabled or under average repairs etc. (*t*).

There are also mutual insurance associations, called protection and indemnity associations, which indemnify their members against certain liabilities which are not covered by the ordinary form of policy, for instance, liability for life salvage, for the loss of or damage to goods carried on their ships, for the one-fourth of the damages consequent on collision which is not covered by the ordinary collision clause, for damage to peers, jetties etc. (*u*).

Protection and indemnity associations.

1002. One loss against which these protection associations indemnify the shipowner is liability for damage to goods on board when caused by the improper navigation of the ship. Damage is caused by improper navigation of the ship, where, owing to the negligence of the shipowner or his servants, whether before or after the commencement of the voyage, the carriage of goods is rendered unsafe and damage ensues (*v*); but when the cargo is damaged by putting it into the ship's hold which is not properly cleaned, this is not improper navigation, because it does not detract from the safety of the vessel for the voyage (*w*).

Liability for improper navigation of ship.

SUB-SECT. 6.—*The Stamp Act as affecting Indemnity Associations*

1003. By the Merchant Shipping Act, 1894 (*x*), the liability of shipowners is limited in the cases therein specified, where the occurrence giving rise to it takes place without their fault or privity, and insurances against such liabilities so occurring are expressly exempted from the requirements of the Stamp Act, 1891 (*y*). In so far, therefore, as protection and indemnity associations protect against such liability they need not issue stamped policies; but these associations rarely issue any policies to their members, whether the liability against which they indemnify be or be not a liability for losses referred to in the above-mentioned statutory provision (*z*). Having regard to the requirements of the Stamp Act, 1891 (*a*), they ought, it seems, to issue a stamped policy

Insurance against the liabilities referred to in the Merchant Shipping Act, 1894, s. 503, and against other liabilities.

Necessity of stamped policy.

(*t*) For a more complete enumeration of risks insured against by mutual insurance and protection associations, see Arnould on Marine Insurance, s. 81, and McArthur, Contract of Marine Insurance, 2nd ed., pp. 346, 353, 355.

(*u*) For a more complete enumeration of these liabilities, see Arnould on Marine Insurance, s. 81.

(*v*) *Good* v. *London Steam Ship Owners' Association* (1871), L. R. 6 C. P. 563; *Carmichael* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (1887), 19 Q. B. D. 242, C. A.; *The Warkworth* (1884), 9 P. D. 145, C. A.

(*w*) *Canada Shipping Co.* v. *British Shipowners' Mutual Protection Association* (1889), 23 Q. B. D. 342, C. A.

(*x*) 57 & 58 Vict. c. 60, s. 503, re-enacting the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 55. See also p. 338, *ante*, and title SHIPPING AND NAVIGATION.

(*y*) 54 & 55 Vict. c. 39, s. 93. See p. 338, *ante*.

(*z*) The practice is for the shipowner to request on a printed form the association to enter his ship or ships for protection or indemnity, and this request when followed by its acceptance constitutes the contract of insurance.

(*a*) 54 & 55 Vict. c. 39, s. 93. For these requirements, see pp. 338, 505, *ante*.

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in all cases where they protect against liabilities other than those which form the subject of special exemption.

Estoppel.

1004. Although no stamped policy has been issued by an association, the association may, by its conduct in admitting the receipt for the plaintiff of the amount of the loss, relieve him of the necessity of relying on the policy (*b*), and conversely a member of a mutual association may be estopped from denying his liability for calls on losses (*c*).

SUB-SECT. 7.—*Rules of Construction applicable to Mutual Insurance.*

Rules of construction.

1005. The same rules of construction as are applicable to ordinary marine insurances apply to insurances effected in mutual insurance and protection and indemnity associations, except so far as they are modified by the terms of the policies issued by the association, or by the rules and regulations of the association (*d*).

SECT. 19.—*Appendix: York-Antwerp Rules*, 1890 (*e*).

RULE I.—JETTISON OF DECK CARGO.

No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

RULE II.—DAMAGE BY JETTISON AND SACRIFICE FOR THE COMMON SAFETY.

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

RULE III.—EXTINGUISHING FIRE ON SHIPBOARD.

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

RULE IV.—CUTTING AWAY WRECK.

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

(*b*) *Re Teignmouth and General Mutual Shipping Association, Martin's Claim* (1872), L. R. 14 Eq. 148. Compare *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1876), 1 Q. B. D. 563, Ex. Ch.; and see title ESTOPPEL, Vol. XIII., p. 388.

(*c*) *Barrow Mutual Ship Insurance Co.* v. *Ashburner* (1885), 54 L. J. (Q. B.) 377, C. A. But compare *Smith's Case* (1869), 4 Ch. App. 611; Buckley on the Companies Acts, 9th ed., 550.

(*d*) Marine Insurance Act, s. 85 (3). As to a rule that the insurances should be renewed from year to year unless the member or the association gives notice to terminate the insurance, see *Lishman* v. *Northern Maritime Insurance Co.* (1875), L. R. 10 C. P. 179, Ex. Ch. As to a rule which provides that no policy issued by the association shall be dealt with so as to part with any beneficial interest in the policy without the consent of the association, and as to other similar rules, see *Laurie* v. *West Hartlepool Thirds Indemnity Association and David* (1899), 4 Com. Cas. 322; *Hutchinson* v. *Wright* (1858), 25 Beav. 444; *North-Eastern* 100A *Steamship Insurance Association* v. *Red "S" Steamship Co.* (1906), 12 Com. Cas. 26, C. A.

(*e*) These rules are to be found in the Report of the Fourteenth Conference (held at Liverpool) of the Association for the Reform and Codification of the Law of Nations, at pp. 279 *et seq.*

RULE V.—VOLUNTARY STRANDING.

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight, or any of them, by such intentional running on shore, shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

RULE VI.—CARRYING PRESS OF SAIL.—DAMAGE TO OR LOSS OF SAILS.

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

RULE VII.—DAMAGE TO ENGINES IN REFLOATING A SHIP.

Damage caused to machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

RULE VIII.—EXPENSES, LIGHTENING A SHIP WHEN ASHORE, AND CONSEQUENT DAMAGE.

When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

RULE IX.—CARGO, SHIP'S MATERIALS, AND STORES BURNT FOR FUEL.

Cargo, ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average.

RULE X.—EXPENSES AT PORT OF REFUGE, ETC.

(a.)—When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(b.)—The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(c.)—Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned, or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall be admitted as general average.

(d.)—If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

SECT. 19. Appendix: York-Antwerp Rules, 1890.

RULE XI.—WAGES AND MAINTENANCE OF CREW IN PORT OF REFUGE, ETC.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs mentioned in Rule X., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

RULE XII.—DAMAGE TO CARGO IN DISCHARGING, ETC.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average, when, and only when, the cost of those measures respectively is admitted as general average.

RULE XIII.—DEDUCTIONS FROM COST OF REPAIRS.

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz. :—

In the case of iron or steel ships, from date of original register to the date of accident,—

Up to 1 year old (A).	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 & 3 years (B).	One-third to be deducted off repairs to and renewal of woodwork of hull, masts and spars; furniture, upholstery, crockery, metal and glassware; also sails, rigging, ropes, sheets and hawsers (other than wire and chain), awnings, covers and painting. One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, chain cables and chains, donkey engines, steam winches and connections, steam cranes and connexions; other repairs in full.
Between 3 & 6 years (C).	Deductions as above under Clause B, except that one-sixth be deducted off ironwork of masts and spars, and machinery (inclusive of boilers and their mountings).
Between 6 & 10 years (D).	Deductions as above under Clause C, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets and rigging.
Between 10 & 15 years (E).	One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.
Over 15 years (F).	One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.
Generally (G).	The deductions (except as to provisions and stores, machinery and boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

In the case of wooden or composite ships :—

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period, a deduction of one-third shall be made, with the following exceptions :—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

In the case of ships generally:—

In the case of all ships, the expense of straightening bent ironwork, including labour of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartages, use of shears, stages and graving dock materials, shall be allowed in full.

RULE XIV.—TEMPORARY REPAIRS.

No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

RULE XV.—LOSS OF FREIGHT.

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

RULE XVI.—AMOUNT TO BE MADE GOOD FOR CARGO LOST OR DAMAGED BY SACRIFICE.

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

RULE XVII.—CONTRIBUTORY VALUES.

The contribution to a general average shall be made upon the actual value of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

RULE XVIII.—ADJUSTMENT.

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules.

Part II. — General Observations on the Various Kinds of Insurances other than Marine Insurance.

SECT. 1.

Various Kinds of Insurances.

SECT. 1.—*Various Kinds of Insurances.*

Various kinds of insurance.

1006. Several kinds of insurances besides marine insurances are specified elsewhere (*f*). There are also insurances against theft or burglary (*g*), insurance of animals, plate glass and other property and insurance against birth of issue (*h*). In fact, there is scarcely any risk that cannot be insured against at Lloyd's, and many insurance companies carry on several kinds of insurance business (*i*).

SECT. 2.—*The Law applicable to Insurance Companies.*

Application of partnership law and company law.

1007. In the absence of statutory provisions to the contrary, partnership law applies to insurance partnership, and company law, including the provisions of the Companies (Consolidation) Act, 1908 (*k*), applies to insurance companies.

Insurance companies registered with unlimited liability usually grant policies and annuities on condition that only the assets of the company are to be liable in respect of the same (*l*).

Provisions in the Companies Consolidation Act, 1908.

1008. Certain provisions in the Companies (Consolidation) Act, 1908 (*k*), relate specially to insurance companies, the most important one being that an insurance company must before it commences business, and in every year during which it carries on business, make a statement relating to its constitution and the liabilities of its members, and must put up such statement in a conspicuous place

(*f*) As to fire insurance, see pp. 516 *et seq.*, *post*; as to life insurance, see pp. 543 *et seq.*, *post*; as to insurance against accidents to the assured, and to third persons, see pp. 566 *et seq.*, *post*; as to insurance against loss by insolvency or dishonesty called guarantee insurance, see pp. 572 *et seq.*, *post*.

(*g*) A policy against burglary or theft contained a proviso that no claim should be made for loss by theft by members of the assured's business staff. A theft was committed by men who got into the premises by the connivance of a member of the business staff. This was held to be within the proviso (*Saqui and Lawrence* v. *Stearns*, [1911] 1 K. B. 426, C. A.).

(*h*) Insurances against burglary and loss of or damage to property are contracts of indemnity, and are subject to the same principles as fire insurance (see pp. 516 *et seq.*, *post*), which is only a particular instance of insurance against accident to property. There are no reported cases upon insurance against birth of issue. Clearly, however, it is not a contract of indemnity, and is therefore in this respect analogous to life insurance (see pp. 543 *et seq.*, *post*).

(*i*) From a legal point of view it is important to classify insurance companies by having regard to the different modes in which they have been formed or constituted. For such a classification, see title COMPANIES, Vol. V., pp. 616 *et seq.* See also pp. 621, 622 (*ibid.*). As to insurances by friendly societies and industrial, provident and collecting societies, see titles COMPANIES, Vol. V., p. 625; FRIENDLY SOCIETIES, Vol. XV., p. 124; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, pp. 1 *et seq.*, *ante*. As to insurances by Government insurance offices, see Bunyon, Law of Life Assurance, 4th ed., pp. 342, 346. As to trade unions, see title TRADE AND TRADE UNIONS.

(*k*) 8 Edw. 7, c. 69. See, generally, titles COMPANIES, Vol. V.; PARTNERSHIP.

(*l*) As to the meaning and effect of the above-mentioned condition, see title COMPANIES, Vol. V., pp. 634, 639.

in the registered office of the company, and in every branch office (*m*).

Life Insurance Acts, 1870, 1871, 1872.

1009. Before 1907 three statutes only (all now repealed) relating to life assurance companies were in force (*n*). Most of their provisions (*o*) are re-enacted with more or less modification by the Assurance Companies Act, 1909 (*p*), which is fully dealt with elsewhere (*q*).

Assurance Companies Act, 1909.

SECT. 3.—*Application of Principles of Marine Insurance to all Insurances.*

Most of the principles and rules of construction in marine insurance apply to all insurances.

1010. Almost all contracts of insurance contain a great number of terms and conditions the construction of which is subject to the same rules as those which have been stated and explained in dealing with marine insurance (*a*).

The legal principles of marine insurance (*a*), such as those relating to fraud, concealment, misrepresentation, warranties, subrogation, agency, reinsurance, rectification of policy (*b*), and return of premium (*c*), apply, with certain few exceptions (*d*), to all insurances, so far as their application is not excluded or modified by the terms of the policy. In treating of insurances on fire, life and other risks, it is therefore necessary only to state those specific exceptions and to illustrate the application of the general rule to the different classes of insurance (*d*).

Premium when recoverable.

1011. With respect to return of premiums, it is a general principle of insurance law that if the risk has once attached, the premium cannot be recovered back (*e*). On the other hand, where a policy is merely voidable on the ground of innocent misrepresentation or concealment on the part of the assured, the latter

(*m*) 8 Edw. 7, c. 69, s. 108; see title COMPANIES, Vol. V., pp. 616 *et seq.*

(*n*) Namely, the Life Assurance Companies Acts, 1870 (33 & 34 Vict. c. 61), 1871 (34 & 35 Vict. c. 58), 1872 (35 & 36 Vict. c. 41); see title COMPANIES, Vol. V., p. 620.

(*o*) Relating to deposits, separate funds, annual statements, audit of accounts, amalgamation, transfer of business etc.; see title COMPANIES, Vol. V., pp. 620 *et seq.*; *Re Life and Health Assurance Association, Ltd.*, [1910] 1 Ch. 458.

(*p*) 9 Edw. 7, c. 49.

(*q*) See title COMPANIES, Vol. V., pp. 395, 620 *et seq.*, 627 *et seq.*, 760.

(*a*) See pp. 342 *et seq.*, *ante*. As to fraud, concealment, and misrepresentation, see p. 404, *ante*; as to warranties, see p. 402, *ante*; as to subrogation, see p. 490, *ante*; as to agency, see p. 354, *ante*; as to reinsurance, see p. 375, *ante*; as to rectification of policy, see p. 403, *ante*; as to return of premium, see p. 496, *ante*.

(*b*) See *Allom* v. *Property Insurance Co.* (1911), *Times*, Commercial Supplement, 10th February.

(*c*) As to return of premiums, see, further, the text, *infra*.

(*d*) The main exceptions above referred to are:—(1) The doctrine of constructive total loss (see p. 480, *ante*) and notice of abandonment (see p. 486, *ante*), the rules as to adjustment of a partial loss (see pp. 463 *et seq.*, *ante*), and the doctrine that a policy may be ratified after a loss (see p. 360, *ante*), apply only to marine insurance and not to any other kind of insurance. (2) Life assurance is not a contract of indemnity, and the principle of subrogation (see p. 490, *ante*) does not apply to it. The practice as to discovery of ship's papers (see p. 503, *ante*) is peculiar to marine insurance, and does not extend to any other cases of insurance (*Tannenbaum & Co.* v. *Heath*, [1903] 1 K. B. 1032, C. A.).

(*e*) *Fowler* v. *Scottish Equitable Life Insurance Society* (1858), 28 L. J. (CH.) 225.

SECT. 3. Application of Principles of Marine Insurance to all Insurances.

is entitled, upon the contract being avoided, to recover the premiums he has paid; but he is not so entitled if the policy is illegal as distinguished from its merely being voidable (*f*).

SECT. 4.—*Wager Policies: The Gambling Act of* 1774.

Common law.

1012. Contracts of life insurance fall within the class of aleatory contracts. At common law, wagers (*g*) concerning matters in which the only interest of the parties was that created by the bet were not *per se* unlawful, and an action could be maintained on a wager on the life of a person unless of such a nature as to be void on grounds of public policy (*h*). But in 1774 the Gambling Act (*i*) (hereinafter referred to as "the Act of 1774") was passed. It enacts that no insurance shall be made by any person or persons on the life or lives of any person or persons or on any other event or events whatsoever wherein the person or persons interested, or for whose benefit, use, or account such policy shall be made shall have no interest, or by way of gaming or wagering, and every insurance made contrary to the true intent thereof shall be null and void (*k*).

Gambling Act, 1774.

Contracts are within the Act of 1774.

1013. The Act of 1774 (*i*) applies not only to insurances on lives, but also to those on any events whatsoever, with the exception of insurances on ships, goods and merchandises; these are expressly excepted (*l*). On the other hand, the Act of 1774 (*i*) does not apply to all contracts by way of gaming or wagering, but only

(*f*) See the elaborate judgment on this point of COLLINS, M.R., in *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K. B. 558, C. A. In *Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A. (a case of a life policy), there was a false representation on the part of the agent of the insurance company that the assured would be entitled to a free policy on paying premiums for a certain number of the years, and the Court of Appeal decided that although the insurers would have been liable during those years, this did not preclude the assured from recovering the premiums. GORELL BARNES, P., observed that in all cases in which a contract is voidable at the option of one party, the other party is under a liability until the former elects to declare the contract void; yet the fact that such a liability exists does not affect the right of the former party to avoid that contract.

(*g*) For definition of "wager," see title GAMING AND WAGERING, Vol. XV., p. 267; *Hampden* v. *Walsh* (1876), 1 Q. B. D. 189; *Carlill* v. *Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, 493.

(*h*) *Chesterfield* (*Earl*) v. *Janssen* (1751), 2 Ves. 125, 137; *March* (*Earl*) v. *Pigot* (1771), 5 Burr. 2803.

(*i*) Life Assurance Act, 1774 (14 Geo. 3, c. 48). Its title is "An Act for regulating insurances upon lives, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the persons insured," and it recites that "it hath been found by experience that the making insurances on lives or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming." The title of the Act of 1774 is, as will be seen from the text, *supra*, far more limited than its operative part.

(*k*) The Life Assurance Act, 1774 (14 Geo. 3, c. 48), s. 1. This Act did not apply to Ireland, but it has been extended to that country by the Life Assurance (Ireland) Act, 1866 (29 & 30 Vict. c. 42). It is doubted in Bunyon, Law of Fire Insurance, 3rd ed., p. 57, whether the latter Act applies to insurances other than those on lives, but on comparing the title to the two Acts it would seem that it does.

(*l*) By the Life Assurance Act, 1774 (14 Geo. 3, c. 48), s. 4. As to these exceptions, see p. 520, *post*.

to such as are contracts of insurance in the ordinary sense of the word. Thus it does not apply to an ordinary *post-obit* bond (*m*), nor to a covenant by which a sum of money is agreed to be returned on the death of A., provided B. (an expectant devisee under the will of A.) cannot make out a good title to certain real estate (*n*).

Insurances which contravene the provisions of the Act of 1774 (*o*) are illegal, therefore where on the trial of an action it appears from the evidence adduced by the plaintiff or otherwise that his claim is founded upon such an illegal policy the court will not entertain the action; and the fact that the illegality is not set up by the defendant makes no difference (*p*).

The Act of 1774, s. 2.

1014. It is also enacted that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's or persons' name or names interested therein or for whose use, benefit, or on whose account such policy is so made or underwrote (*q*).

The Act of 1774, s. 3.

1015. It is further enacted that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives, or other event or events (*r*). The interest here referred to is that which the assured has at the time of effecting the policy, and he therefore cannot recover more than the amount or value of the interest which he had at that time (*a*).

SECT. 5.—*Stamps on Policies other than Marine Policies.*

Stamp Act, 1891.

1016. A penalty of £20 is imposed on any person who fails to execute a duly stamped policy within one month after receiving or taking credit for the premium or consideration for any insurance other than sea insurance; or who makes or issues a policy (other than a marine policy), which is not duly stamped, or pays money or allows it in account upon or in respect of such a policy (*b*).

(*m*) *Wharton* v. *May* (1799), 5 Ves. 27.

(*n*) *Cook* v. *Field* (1850), 15 Q. B. 460. There is strong authority for saying that the Life Assurance Act, 1774 (14 Geo. 3, c. 48), applies only to contracts made in the form of a policy of insurance, or at any rate, only to such as are usually made in that form; but there are one or two cases pointing to a contrary conclusion. It is impossible to reconcile all the judgments on this subject; they are discussed in 2 Smith, L. C., 11th ed., pp. 279—286. But a discussion of this question is unnecessary in treating of life, accident, and other like insurances, which are contracts made in the form of a policy of insurance. Moreover, the Gaming Act, 1845 (8 & 9 Vict. c. 109) (see title GAMING AND WAGERING, Vol. XV., pp. 276 *et seq.*), has made the question one of comparatively little importance.

(*o*) Life Assurance Act, 1774 (14 Geo. 3, c. 48).

(*p*) *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214, 220; compare *Buchanan & Co.* v. *Faber* (1900), 4 Com. Cas. 223.

(*q*) Life Assurance Act, 1774 (14 Geo. 3, c. 48), s. 2. See *Shilling* v. *Accidental Death Insurance Co.* (1857), 2 H. & N. 42, and p. 547, *post*.

(*r*) Life Assurance Act, 1774 (Geo. 3, c. 48), s. 3.

(*a*) *Dalby* v. *India and London Life Assurance Co.* (1855), 15 C. B. 365, 2 Smith, L. C., 11th ed., 271, Ex. Ch., overruling *Godsall* v. *Boldero* (1807), 9 East, 72; 2 Smith, L. C., 11th ed., 263.

(*b*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 100. The stamp duties on a life

SECT. 5. Stamps on Policies etc.

It seems, however, that notwithstanding the first-mentioned provision, a binding contract of life insurance may be made verbally (*c*).

Limit of time for stamping. Penalties.

1017. Policies may be stamped, without penalty, thirty days after their first execution, or after they are received within the United Kingdom if executed elsewhere. Moreover, any unstamped or insufficiently stamped policy may be stamped after execution on payment of the unpaid duty, with interest where the duty exceeds £10, and a penalty of £10 (*d*). The Commissioners of Inland Revenue may, if they think fit, remit the penalties or any part thereof (*e*).

Assignment of policy.

An assignment of a policy of life insurance must be duly stamped (*f*).

Policies issued by friendly societies need not be stamped (*g*).

Accident, sickness, burglary, fire etc. policies.

Accident policies, and policies of insurance for any payment agreed to be made during the sickness of any person, or during his incapacity from personal injury, or by way of indemnity against loss or damage of or to any property (which include fire policies) must be stamped with a penny stamp, and so must a policy of reinsurance against these risks between insurance companies (*h*).

Employers' liability policies must also be stamped with a penny stamp (*i*).

Part III.—Fire Insurance.

SECT. 1.—*Nature and Form of the Contract: The Stamp Act.*

Definition of the contract.

1018. A contract of fire insurance is a contract by which the insurer agrees, for valuable consideration (usually called the premium), to indemnify the assured, up to a certain amount and subject to certain terms and conditions, against loss or injury by fire which may happen to the property insured during a specified period. The contract is generally embodied in an instrument called "a policy" (*k*), which sets out the various terms and conditions upon which the insurance is effected.

policy are as follows:—On a sum insured not exceeding £10, 1*d.*; above £10, and not exceeding £25, 3*d.*; above £25, and not exceeding £500, 6*d.* for every £50 or fractional part thereof; above £500, and not exceeding £1,000, 1*s.* for every £100 or fractional part thereof; above £1,000, for every £1,000 or fractional part thereof, 10*s.*

(*c*) *Newman* v. *Belsten* (1884), 28 Sol. Jo. 301, C. A.

(*d*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 15 (1), (3) (b).

(*e*) *Ibid.*, s. 15 (2) (a), (3) (a).

(*f*) *Ibid.*, s. 118.

(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 33; and see title FRIENDLY SOCIETIES, Vol. XV., p. 161.

(*h*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 91, 98 (2), 99, 100, and Sched. I. A so-called policy guaranteeing the payment of a fixed sum at a certain date, and providing for payments of surrender value if required at an earlier date, is chargeable with a 6*d.* agreement stamp (*Mortgage Insurance Corporation* v. *Inland Revenue Commissioners* (1888), 21 Q. B. D. 352, C. A.).

(*i*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 11. As to stamp duties generally, see title REVENUE.

(*k*) For a usual form of policy, see p. 527, *post*.

1019. Such a formal document is not, however, necessary in order to constitute a valid contract of fire insurance (*l*). Thus a slip, initialled by a broker with a view to the preparation of a policy, may create a binding contract of insurance (*m*). In fact a proposal to insure and an acceptance of such proposal may constitute a binding contract to insure even without the payment of any premium (*n*), and where such a contract has been entered into the insurers will be compelled by a decree for specific performance to grant a policy, notwithstanding that a fire has taken place (*o*). No formal policy necessary

1020. On making the proposal to insure, the premium or some part of it is usually paid by the proposer, who thereupon receives what is called a deposit receipt or interim protection note (often called a "cover note"), holding him secure for a definite period until his proposal has been accepted or declined by the insurance office. If the fire occurs before the expiration of the period, the insurers, unless they have previously declined the risk, will be responsible for the loss. Thus the interim protection note or deposit receipt is evidence of a proposal by the insured to effect an insurance subject to all the usual terms and conditions of the insurance office, and also constitutes an undertaking that, pending the acceptance or refusal by the company, the property is held insured under these conditions. The deposit receipt or interim protection note therefore constitutes a contract of insurance for a certain time (*p*). Cover note.

1021. By the Stamp Act, 1891 (*q*), the expression "policy of insurance" includes any writing whereby any contract of insurance is made or agreed to be made or is evidenced, and all such documents require a penny stamp (*r*). A deposit receipt or protection note, being a contract for insurance, is a policy within the statute (*q*). But an unstamped policy may, on payment of the penalty, be stamped at any time after its execution (*s*). Stamp Act, 1891.

1022. A contract of fire insurance is a personal contract with the assured, and is not a contract passing with the property insured. Therefore, on the sale of a thing insured, no interest in the policy passes to the purchaser unless at the time of the sale the policy be assigned expressly or impliedly, and it may consequently happen that, although property is insured and a fire occurs, no action can be maintained by anyone on the policy. Thus, if a vendor who has insured property against fire conveys it to a purchaser without assigning the policy and a fire occurs, neither vendor nor purchaser Personal nature of contract.

(*l*) *Re Norwich Equitable Fire Assurance Society, Royal Insurance Co.'s Claim* (1887), 57 L. T. 241.

(*m*) *Thompson* v. *Adams* (1889), 23 Q. B. D. 361.

(*n*) *Bhugwandass* v. *Netherlands India Sea and Fire Insurance Co. of Batavia* (1888), 14 App. Cas. 83 P. C. (a case of marine insurance, where the Stamp Acts (see pp. 338, 515, *ante*) were inapplicable).

(*o*) *Bhugwandass* v. *Netherlands India Sea and Fire Insurance Co. of Batavia, supra;* compare *Motteux* v. *London Assurance Co.* (1739), 1 Atk. 545; *Mead* v. *Davison* (1835), 3 Ad. & El. 303, 309; *Parry* v. *Great Ship Co.* (1863), 10 Jur. (N. S.) 294. For specific performance generally, see title SPECIFIC PERFORMANCE.

(*p*) *Citizens Insurance Co. of Canada* v. *Parsons, Queen Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96, 124, 125, P. C.

(*q*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 91.

(*r*) *Ibid.*, Sched. I.; see s. 99 (*ibid.*), and p. 516, *ante*

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 14, 15.

SECT. 1. Nature and Form of the Contract: The Stamp Act.

can recover; the vendor because he has parted with his interest, and the purchaser because he is not insured by the policy (*t*).

SECT. 2.—*Subrogation.*

Contract is one of indemnity.

1023. It is a fundamental principle that the contract of fire insurance, like that of marine insurance, is presumed to be a contract of indemnity (*a*); and the rules of law relating to insurable interest in marine insurance apply equally to fire insurance (*b*).

Application of doctrine of subrogation.

From this it follows that the principle of subrogation applicable to marine insurance applies also to fire insurance (*c*). This doctrine, indeed, receives its most frequent and most important application in fire insurance. For example, where insured property has been damaged by fire under such circumstances as to entitle the assured to be paid compensation for the damage out of the police rate under the Riot (Damages) Act, 1886 (*d*), the insured owner can pursue one of two courses. He can at once recover from the insurance office the whole amount of the damage, and then the office having paid the loss will be entitled to claim or recover in the owner's name (*e*) the compensation which is payable out of the police rate; or the owner can begin by claiming compensation out of the police rate, and then, after having received that amount, recover from the insurance office the difference between the amount payable under the policy and the sum received for compensation (*f*).

Compensation from police rate.

Landlord's right against tenant.

Again, where a lessee of a house is bound by a covenant to repair and it is destroyed by fire, the lessor who has insured can at once recover the amount insured from the insurance office, and the office on payment of the loss will be subrogated to the owner's rights against the lessee, and can sue in the owner's name the lessee under his covenant to repair; or the lessor can in the first instance recover compensation from the lessee under the covenant to repair, and then claim from the insurance office the difference

(*t*) *Lynch* v. *Dalzell* (1730), 4 Bro. Parl. Cas. 431; *Sadlers Co.* v. *Badcock* (1743), 2 Atk. 554; *Poole* v. *Adams* (1864), 33 L. J. (CH.) 639; *North of England Oilcake Co.* v. *Archangel Insurance Co.* (1875), L. R. 10 Q. B. 249; *Rayner* v. *Preston* (1881), 18 Ch. D. 1, C. A., *per* BRETT, L.J., at pp. 11, 12; *Collingridge* v. *Royal Exchange Assurance Corporation* (1887), 3 Q. B. D. 173; *Ecclesiastical Commissioners for England* v. *Royal Exchange Assurance Corporation* (1895), 11 T. L. R. 476, C. A. Fire policies are not assignable without the consent of the office (*Lynch* v. *Dalzell*, *supra*; *Sadlers Co.* v. *Badcock*, *supra*; see title CHOSES IN ACTION, Vol. IV., p. 402); but this matter is usually the subject of express condition, see p. 529, *post*. As to the assignment of the policy, see p. 543, *post*.

(*a*) *Darrell* v. *Tibbitts* (1880), 5 Q. B. D. 560, C. A.; *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A. See title GUARANTEE, Vol. XV., p. 444.

(*b*) See p. 366, *ante*, and p. 519, *post*.

(*c*) See p. 490, *ante*; *Castellain* v. *Preston*, *supra*.

(*d*) 49 & 50 Vict. c. 38, s. 1; and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 300, note (*c*); POLICE.

(*e*) It seems open to argument that under the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), ss. 1, 2, 4, the assurers after paying the loss are entitled to sue in their own names; but see p. 519, *post*.

(*f*) *Aldridge* v. *Great Western Rail. Co.* (1841), 3 Man. & G. 515; *Mason* v. *Sainsbury* (1782), 3 Doug. (K. B.) 61; *Clark* v. *Blything* (*Inhabitants*) (1823), 2 B. & C. 254.

between such compensation and the amount insured (*g*). Moreover, if the assured should renounce any of his rights and remedies against third parties to the benefit of which, if not renounced, the insurers would have been subrogated, the assured will have to answer to insurers for the amount of the benefit he has lost (*h*). In short, the insurer on payment of the loss is entitled to the advantage of every right of the assured, whether such right consists in contract or in remedy for tort, or to anything he has received or is entitled to recover in diminution of the loss (*i*). SECT. 2. Subrogation.

Thus, where an assured has received from a corporation notice to treat for certain property which is subsequently burned and the loss paid by insurers, the latter will be subrogated to the rights of the assured against the corporation, and the assured is not entitled as against them to accept in satisfaction of his claim the amount of the loss less the money received from the insurers (*k*). Compulsory purchase.

1024. Insurers cannot, however, by reason of their right to subrogation, sue in their own name; they must sue in the name of the assured, and cannot recover from the third party unless the assured would himself be entitled so to do (*l*). But payment honestly made by insurers in satisfaction of a claim by the insured entitles the former to the remedies available to the latter; and such remedies cannot be resisted on the ground that the damage sustained was not covered by the terms of the policy (*m*). Insurers must sue in names of assured.

1025. It is only on payment of the whole of the loss sustained by the assured that the insurer is entitled to be subrogated to the rights of the former, so that if the amount insured is less than the amount of such loss, the insurance office, though it has paid the amount insured, would not be subrogated to the rights of the assured. Therefore the assured will remain *dominus litis* in the action brought by him against the person primarily liable, and will be entitled to compromise the action without the assent of the office, provided always he acts *bonâ fide*, without any intention to sacrifice the interests of the insurers (*n*). Subrogation only effectual on payment of whole of the loss.

SECT. 3.—*Insurable Interest.*

SUB-SECT. 1.—*What constitutes Insurable Interest.*

1026. All fire policies relating to insurances on houses, buildings, and other like real property are prohibited where the person for whose use, benefit, or on whose account they are made has no Effect of Gambling Act, 1774.

(*g*) *Darrell* v. *Tibbitts* (1880), 5 Q. B. D. 560, C. A. The rights of the lessor and lessee *inter se* may, of course, be regulated by the provisions of the lease; see title LANDLORD AND TENANT.

(*h*) *West of England Fire Insurance Co.* v. *Isaacs*, [1896] 2 Q. B. 377, *per* COLLINS, J., at p. 383; affirmed, [1897] 1 Q. B. 226, C. A. (benefit of repairing covenant); *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K. B. 753 (benefit of notice to treat).

(*i*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A., *per* BRETT, L.J., at p. 388 (benefit of contract of sale).

(*k*) *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K. B. 753.

(*l*) *Simpson* v. *Thomson* (1877), 3 App. Cas. 279.

(*m*) *King* v. *Victoria Insurance Co.*, [1896] A. C. 251, P. C.

(*n*) *Commercial Union Assurance Co.* v. *Lister* (1874), 9 Ch. App. 483. For the similar position in marine insurance, see p. 493, *ante*.

SECT. 3. Insurable Interest.

interest (*o*). Moreover, the name of the person interested, or for whose use or benefit, or on whose account, the policy is made must be inserted therein, and no greater sum can be recovered than the amount or value of the assured's interest at the time of the effecting of the policy (*p*). Nor can the assured recover more than the amount or value of his interest at the time of the loss, inasmuch as the contract of insurance is, by its very nature, and generally by its express terms, a contract of indemnity (*q*).

As regards fire insurances on goods, they are, though not within the Act of 1774 (*p*), if they be wagering contracts, null and void by reason of the Gaming Act, 1845 (*r*).

Insurable interest.

1027. The legal principles of marine insurance as to what constitutes an insurable interest apply equally to fire insurance, with this exception (arising from the Act of 1774) (*p*), that in case of fire insurance on houses or buildings the assured must have an insurable interest at the time of effecting it, as well as at the time of loss, whereas in the case of marine insurance it is sufficient for the assured to acquire such an interest any time before the loss (*s*). A defeasible interest or a contingent interest, or a partial interest of any nature, is insurable; and any person who stands in any legal or equitable relation to the insured property, in consequence of which he may be prejudiced by its loss or by damage thereto by fire, has an insurable interest (*t*).

SUB-SECT. 2.—*Vendor and Purchaser of Real Property.*

Vendor and purchaser of real property.

1028. The legal relation between the vendor and purchaser of real property under a contract which is still *in fieri* is not exactly, even as regards the property itself, the relation of trustee and *cestui que trust*, because it is uncertain whether the contract will or will not be performed. But when the contract is actually completed by conveyance or is performed in everything except the mere formal act of sealing the engrossed deeds, then that completion relates back, and the relation between trustee and *cestui que trust* as to the property the subject-matter of the contract is established (*a*). But this relation does not extend, in the absence of an assignment or agreement to assign, to the benefit of a policy of insurance against fire. Thus where the vendor who has insured his house against fire contracts to sell it, and between the date of the contract and its completion the house is damaged by fire, and the insurance company, not being aware of the contract, pays the amount of the loss to the vendor, the purchaser is not entitled to have the insurance money deducted by way of abatement from the

(*o*) See Life Assurance Act, 1774 (14 Geo. 3, c. 48), ss. 1, 2, 4; and see p. 514, *ante*.

(*p*) Life Assurance Act, 1774 (14 Geo. 3, c. 48), ss. 1, 2, 4; and see p. 514, *ante*.

(*q*) See, further, title GUARANTEE, Vol. XV., pp. 444 *et seq.*

(*r*) 8 & 9 Vict. c. 109, s. 18. See title GAMING AND WAGERING, Vol. XV., p. 268.

(*s*) See p. 367, *ante*.

(*t*) See pp. 367 *et seq.*; *ante*, and the text, *infra*.

(*a*) *Rayner* v. *Preston* (1881), 18 Ch. D. 1, C. A., *per* JAMES, L.J., at p. 13; *Ridout* v. *Fowler*, [1904] 1 Ch. 658, *per* FARWELL, J., at p. 661; affirmed, [1904] 2 Ch. 93, C. A. See generally, as to the relationship of vendor and purchaser of real property, title SALE OF LAND.

purchase-money. On the other hand, the vendor, when he has received the insurance money from the insurers, is bound, in accordance with the principle of subrogation, to repay them that amount out of the purchase-money received from the purchaser (*b*).

SUB-SECT. 3.—*Vendor and Purchaser of Goods.*

Vendor and purchaser of goods.

1029. The vendor of goods in which the property and risk have not passed to the purchaser at the time of the former effecting the insurance on them has, of course, an insurable interest in them to the amount of their value. But if before the loss or damage the property has passed from the vendor to the purchaser, and it has not been agreed between them that the policy shall enure for the benefit of the purchaser, the vendor, having no interest in the goods at the time of the loss, cannot recover on the policy (*c*). On the other hand, if such an agreement has been come to, the vendor holds the policy in trust for the purchaser, and the latter can maintain an action upon it in the vendor's name (*d*).

Insurance on profits.

1030. The person who has entered into an agreement for the sale of goods can insure the profits he expects to derive from them, but only by a policy in which profits are insured *eo nomine*. An insurance merely on goods will not cover a loss of profits (*e*).

SUB-SECT. 4.—*Mortgagor and Mortgagee.*

Mortgagor and mortgagee.

1031. A mortgagor of property has an insurable interest in it for the full value; a mortgagee has an insurable interest for the amount of the mortgage debt, and if he intended to insure for the benefit of the mortgagor as well as of himself, he can recover from the insurers the full amount insured, holding its excess over the mortgage debt in trust for the mortgagor. Whether this was or was not his intention is a question of fact (*f*).

(*b*) *Rayner* v. *Preston* (1881), 18 Ch. D. 1, C. A.; *Poole* v. *Adams* (1864), 33 L. J. (CH.) 639; *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A.

(*c*) *North of England Oil-cake Co.* v. *Archangel Insurance Co.* (1875), L. R. 10 Q. B. 249 (marine).

(*d*) *Powles* v. *Innes* (1843), 11 M. & W. 10; compare *Lloyd* v. *Fleming* (1872), L. R. 7 Q. B. 299, 303 (marine); and see pp. 360, 520, *ante*. See also, on the question of insurable interest under a contract of sale, *Sentance* v. *Hawley* (1863), 13 C. B. (N. S.) 458; *Sparkes* v. *Marshall* (1836), 2 Bing. (N. C.) 761; *Inglis* v. *Stock* (1885), 10 App. Cas. 263. Where goods were left in the seller's warehouse, and were burned at a date when the risk was the purchaser's, the seller, having recovered under a floating policy not more than sufficient to cover his loss apart from the specific goods, was held not bound to apply any part of the insurance moneys in reduction of the price of such goods (*Martineau* v. *Kitching* (1872), L. R. 7 Q. B. 436). As to sale of goods generally, see title SALE OF GOODS.

(*e*) *Re Wright and Pole* (1834), 1 Ad. & El. 621; *Stockdale* v. *Dunlop* (1840), 6 M. & W. 224, 232; and see p. 365, *ante*.

(*f*) *Irving* v. *Richardson* (1831), 2 B. & Ad. 193. In *Castellain* v. *Preston*, *supra*, BOWEN, L.J., says, at p. 398: "It is well known in marine and in fire insurances that a person who has a limited interest may insure, nevertheless, on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions; first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject matter, and secondly, he must intend to insure the whole value at the time. When the insurance is effected, he cannot recover the entire value unless he has intended to

SECT. 3. Insurable Interest.

Reinstatement.

1032. As a contract of fire insurance is a personal contract, which does not pass with the property (*g*), it follows that where mortgaged property which has been insured by the mortgagor is destroyed by fire, the mortgagee is not, in the absence of a covenant as to the application of the insurance money, entitled to have it applied in payment of the mortgage debt, even where the policy has been effected by the mortgagor in pursuance of a covenant by him with the mortgagee (*h*). The same principle would apply to the mortgagor in case of a policy effected by the mortgagee (*i*).

1033. Whether either the mortgagor or mortgagee can, in the case of an insurance on buildings, as a "person interested," invoke the aid of the statute (*k*) relating to reinstatement, by requesting the office to lay out the insurance money in rebuilding or repairing the premises, seems doubtful.

1034. Although a mortgagee has an insurable interest, and can insure the mortgaged property in its full value, he is not, apart from authority given to him by statute, or agreement between the parties, entitled to charge the mortgagor or the mortgaged property with the premiums of insurance, nor can he do so even when the

insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy, but he can only hold for so much as he has intended to insure" (see as to this passage, *Gaussen* v. *Whatman* (1905), 93 L. T. 101, 103). . . . "If he has the legal ownership, he is entitled to insure for the whole value, but even supposing he is not entitled to the legal ownership, he is entitled to insure *primâ facie* for all. If he intends to cover only his mortgage, and is only insuring his own interest, he can only, in the event of a loss, hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover. But one thing he cannot do, that is, having intended only to cover himself, and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest." This judgment must, however, be read subject to the observation that an insurance on houses or other buildings is within the Life Assurance Act, 1774 (14 Geo. 3, c. 48) (see p. 514, *ante*), and therefore the assured cannot recover more than the value of his interest at the time of effecting the policy, which also must mention the names of the persons interested or for whose benefit the insurance is effected (*ibid.*, ss. 2, 3). Under the old system of pleading it was doubted whether an allegation in a declaration on a policy that A. and B. were interested in the property insured was satisfied by proof that A. was mortgagor, and B. mortgagee (*Pim* v. *Reid* (1843), 6 Man. & G. 1).

(*g*) See p. 517, *ante*. As to the relation of mortgagor and mortgagee generally, see title MORTGAGE.

(*h*) *Lees* v. *Whiteley* (1866), L. R. 2 Eq. 143; *Rayner* v. *Preston* (1881), 18 Ch. D. 1, 8, C. A.; distinguish *Garden* v. *Ingram* (1852), 23 L. J. (CH.) 478.

(*i*) But where there is an agreement to apply the insurance money in discharge of the mortgage debt, the mortgagor's interest is *pro tanto* covered (*Nichols* v. *Scottish Union and National Insurance Co.* (1885), 2 T. L. R. 190).

(*k*) Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78); see p. 542, *post*. See *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), 13 App. Cas. 699, 713; see also *Wimbledon Park Golf Club* v. *Imperial Insurance Co.* (1902), 18 T. L. R. 815. As to reinstatement, see further, p. 541, *post*.

mortgagor has covenanted to insure and has neglected to do so (*l*). But a mortgagee, where the mortgage is made by deed, has certain statutory powers to insure against loss or damage by fire, and to charge the mortgaged property with the premiums (*m*). Mortgagee's statutory powers.

SUB-SECT. 5.—*Trustees and Executors.*

1035. The trustee in whom the legal ownership of trust property is vested can, in the absence of any provision in the policy to the contrary, insure the property in his own name (*n*), but if the trustee has not the legal interest vested in him and the property consists of lands and buildings, as distinguished from goods, the name of the *cestui que trust* must be inserted in the policy in order to satisfy the requirements of the Act of 1774 (*a*). The Act of 1774 (*n*) does not apply to insurances on goods, but fire policies almost always contain a condition that the fact of a person being a trustee must be stated in the policy (*b*). Trustee.

SUB-SECT. 6.—*Lessor and Lessee.*

1036. A lessor has, of course, an insurable interest in the full value of the property leased, and so has the lessee where he is liable to his landlord for a loss by fire, either because it is "waste" for which he is responsible, or because he has covenanted to keep the leased premises in repair. Moreover, the lessee has, as a limited owner in possession, an insurable interest in the demised premises (*c*). Lessor and lessee.

When the landlord has covenanted to keep the premises in repair, or to make good the damage done by fire, the insurance office with whom the tenant has insured is subrogated to his rights under the covenant of the landlord (*d*). Subrogation.

(*l*) *Dobson* v. *Land* (1850), 8 Hare, 216; *Bellamy* v. *Brickenden* (1861), 2 John. & H. 137; *Brooke* v. *Stone* (1865), 12 L. T. 114. But a mortgagee in possession was allowed the expense of insurance under the usual directions as to just allowances (*Scholefield* v. *Lockwood* (1863), 33 L. J. (CH.) 106).

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19 (1) (ii.). These powers are subject to certain conditions, for which see *ibid.*, s. 23; and title MORTGAGE.

(*n*) Life Assurance Act, 1774 (14 Geo. 3, c. 48).

(*a*) *Ibid.* See *Collett* v. *Morrison* (1851), 9 Hare, 162; *Hodson* v. *Observer Life Assurance Society* (1857), 8 E. & B. 40; and p. 514, *ante*.

(*b*) See p. 524, *post*. As to the powers of a trustee to insure and to charge the income of the trust estate with the premiums, see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 18, which applies also to executors and administrators (*ibid.*, s. 18); but such persons are not bound either to insure or to continue the insurances of the deceased whom they represent (Williams, Law of Executors and Administrators, 10th ed., 1444). See also titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 300; TRUSTS AND TRUSTEES.

(*c*) See *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A., *per* BOWEN, L.J., at p. 398; and title LANDLORD AND TENANT.

(*d*) As to subrogation generally, see pp. 490, 518, *ante*. For the converse case where a landlord has insured, see p. 518, *ante*. When a tenant has an option to purchase demised premises, which the lessor has insured, and they are damaged by fire, questions have arisen as to whether the tenant is entitled to any and to what extent to the benefit of the lessor's insurance. As to such questions,

SECT. 3. Insurable Interest.

Covenant to repair but no covenant to insure.

1037. Where a lease contains a covenant by the tenant to repair, but no covenant to insure, and separate insurances have been effected by the landlord and tenant, the landlord will be entitled to recover on his policy the full amount insured, although the policy contains the usual average clause, and the landlord has taken no steps to enforce the covenant to repair, and the tenant has, since the fire, become bankrupt, so as to render the insurer's right of subrogation nugatory (*e*).

SUB-SECT. 7.—*Bailor and Bailee.*

Bailor and bailee.

1038. The owner of goods who has bailed them has an insurable interest for the full value of the goods; so has the bailee if he is responsible for the loss of the goods by fire, as, for instance, a common carrier (*f*), and to a more limited extent an innkeeper or a pawnee (*g*). An innkeeper has also an insurable interest in respect of the lien which he has on the goods of his guests, and a pawnee in respect of his security (*h*).

Bailee's power to insure to full value.

A bailee in possession of goods can, in the absence of an express provision to the contrary, insure them to their full value, and will hold the excess of the sum insured over the amount of his lien, or that of his liability to the bailor, in trust for the latter (*i*).

Goods held in trust or on commission.

But almost all fire policies contain the condition that goods held in trust or on commission will not be covered by the policy without special mention, and a bailee is a person holding the goods as trustee within the meaning of such condition (*k*). Thus wharfingers insured under a policy expressly covering "goods held by them on trust or on commission," and containing the

see *Reynard* v. *Arnold* (1875), 10 Ch. App. 386; *Edwards* v. *West* (1878), 7 Ch. D. 858; and titles LANDLORD AND TENANT; SALE OF LAND.

(*e*) *Andrews* v. *Patriotic Assurance Co.* (1886), 18 L. R. Ir. 355. In this case the court applied the principles laid down in *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1877), 5 Ch. D. 569, C. A., which is fully discussed on p. 537, *post*. Leases contain varying provisions as to reinstatement of premises and liability for damage by fire; see title LANDLORD AND TENANT. As to the right of persons interested to require the insurers to reinstate under the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 83, see p. 542, *post*.

(*f*) *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478; and see title CARRIERS, Vol. IV., p. 92. As to bailment generally, see title BAILMENT, Vol. I., pp. 523 *et seq.*

(*g*) For the limitation on an innkeeper's liability, see Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41); and title INNS AND INNKEEPERS, p. 321, *ante*. The liability of pawnbrokers in case of fire is imposed by the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 27, which also gives the right to insure; see title PAWNS AND PLEDGES.

(*h*) As to the insurable interest of a pledgee, see *Sutherland* v. *Pratt* (1843), 12 M. & W. 16; as to that of a person having a lien, *Wolff* v. *Horncastle* (1798), 1 Bos. & P. 316, *per* BULLER, J., at p. 323; *Hancox* v. *Fishing Insurance Co.* (1837), 3 Sumner, 132 (U.S.A.), *per* STORY, J., at p. 139. As to innkeepers' lien, see title INNS AND INNKEEPERS, pp. 323 *et seq.*, *ante*. As to lien generally, see title LIEN.

(*i*) See p. 366, *ante*.

(*k*) The following is an example of such a condition: "Persons intending to insure property of which they are not absolutely and beneficially the owners will not be entitled to any benefit from their policies unless it is therein stated that such property is held in trust or on commission or otherwise as the case may be."

usual condition that it shall not "extend to cover any goods held in trust or on commission unless the same be expressly inserted in the policy," can recover the full value of goods destroyed by fire, holding the excess of the value over the amount of their lien in trust for the owners (*l*). On the other hand, if the insurance is expressed to be "on merchandise the assured's own or for which they are responsible" in or on certain warehouses etc., the assured can recover only in respect of goods belonging to the assured or for which they were responsible, and not in respect of goods the property in which had at the time of the fire passed to the purchasers, at whose risk they were (*m*).

SUB-SECT. 8.—*Joint Owners; Bankrupts; Incumbents of Benefices.*

1039. Joint owners of property, whether partners or not, have severally insurable interests which extend to the entirety of the property and not merely to the value of their shares (*n*). Joint owners.

1040. A bankrupt has an insurable interest in property of the estate of which he is in possession, although it is vested at law in the trustee in bankruptcy, because he is responsible to the trustee as the real owner (*o*). Bankrupt.

1041. An incumbent of a benefice who is bound to keep in repair the buildings belonging to it has an insurable interest. The rector may also insure the church in his own name, since the freehold of the whole church is in him (*p*). Incumbent.

SECT. 4.—*Reinsurance.*

1042. After the assurance has been made, the insurer himself may insure against the risk which he has undertaken, and has an insurable interest to the extent of the liability which he may incur under and by reason of his original contract of insurance. The contract by which he protects himself against the risk for which he has made himself responsible to the original assured is called the contract of reinsurance (*q*). Reinsurance.

(*l*) *Waters* v. *Monarch Life Assurance Co.* (1856), 5 E. & B. 870; *London and North Western Rail. Co.* v. *Glyn* (1859), 1 E. & E. 652. As to the meaning of goods "held in trust," see also *South Australian Insurance Co.* v. *Randell* (1869), L. R. 3 P. C. 101.

(*m*) *North British Insurance Co.* v. *Moffatt* (1871), L. R. 7 C. P. 25.

(*n*) *Page* v. *Fry* (1800), 2 Bos. & P. 240. As to joint ownership, see titles PARTNERSHIP; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.

(*o*) *Marks* v. *Hamilton* (1852), 7 Exch. 323; *Goulstone* v. *Royal Insurance Co.* (1858), 1 F. & F. 276.

(*p*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 772, 773. As to the respective interests of a lay rector and a vicar and churchwardens in the church itself, see *ibid.*, pp. 468, 469; as to the responsibility of churchwardens for church furniture, see *ibid.*, p. 467; *Liddell* v. *Beal* (1860), 14 Moo. P. C. C. 1.

(*q*) See further as to reinsurance generally, pp. 375 *et seq.*, *ante*. As to the construction of a clause purporting to incorporate in the reinsurance policy (*inter alia*) a clause in the original policy limiting time within which an action may be brought, see *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Insurance Co.*, [1907] A. C. 59, P. C.

SECT. 4. Reinsurance.

Running accounts.

1043. Agreements for a running account are often entered into between two insurance offices, the one company agreeing to undertake a portion of the whole, or of certain descriptions, of the risks of the other (*r*). Such an agreement does not constitute an agreement of partnership, but only a contract to reinsure (*a*).

SECT. 5.—*Commencement and Duration of Risk.*

Commencement of risk.

1044. The risk commences from the time when the deposit receipt is given (*b*) : in other words, from the time when the contract is complete. The deposit receipt (*b*) usually stipulates that the insurers shall have a certain number of days in which to make inquiries, survey the premises etc., before completing the contract. But there is no implied condition that the policy will be issued within a reasonable time; and in the absence of any evidence of an intention to abandon the insurance or of *mala fides*, the assured who has received a covering document will be protected although no policy may have been issued during a long interval (*c*).

Stipulations in cover note.

Continuation of risk.

1045. The risk continues for the term mentioned in the policy (*d*). In addition, whether it be or be not so stated in the policy, there are usually fifteen days of grace during which the assured has the opportunity of tendering the renewal premium. But when the policy provides that there shall be no insurance until the renewal premium has been accepted by the insurance office, and a loss accrues during the fifteen days and before payment of the premium, it seems that in the absence of any condition so framed as to show a contrary intention, the assured is not entitled to recover (*e*). Moreover, the insurers may give notice before the expiration of the insured period that they will not renew the policy at the old premium, and if no new agreement is come to before the loss the insurers will not be liable on the policy, if the increased premium be tendered after a loss, but during the fifteen days (*f*).

Duration of risk.

1046. On payment of the renewal premium the policy remains in force for a year from the expiration of the former year not including the days of grace (*g*), and if a renewal premium is tendered after the expiration of the days of grace, and accepted by

(*r*) *Gledstanes* v. *Royal Exchange Assurance Corporation* (1864), 5 B. & S. 797 ; *Prince of Wales Life Assurance Co.* v. *Harding* (1858), E. B. & E. 183.

(*a*) *Re Norwich Equitable Fire Assurance Society, Royal Insurance Co.'s Claim* (1887), 57 L. T. 241.

(*b*) See p. 517, *ante*. See *Citizens Insurance Co. of Canada* v. *Parsons, Queen Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96, 124, P. C. ; *Bhugwandass* v. *Netherlands India Sea and Fire Insurance Co. of Batavia* (1880), 14 App. Cas. 83, P. C.

(*c*) *Thompson* v. *Adams* (1889), 23 Q. B. D. 361 ; *Bhugwandass* v. *Netherlands India Sea and Fire Insurance Co. of Batavia, supra.*

(*d*) In a policy from 14th February to 14th August the whole of the 14th August is included (*Isaacs* v. *Royal Insurance Co.* (1870), L. R. 5 Exch. 296) ; see, further, title TIME.

(*e*) *Tarleton* v. *Staniforth* (1796), 1 Bos. & P. 471, Ex. Ch. ; compare *Simpson* v. *Accidental Death Insurance Co.* (1857), 2 C. B. (N. S.), 257.

(*f*) *Salvin* v. *James* (1805), 6 East, 571 ; *Simpson* v. *Accidental Death Insurance Co., supra.*

(*g*) *Salvin* v. *James, supra, per* Lord ELLENBOROUGH, C.J., at p. 582.

the insurers in ignorance that a loss has occurred within such days, the policy is not revived (*h*). The renewal premium must be paid to the insurance office or its agent, and the fact that the office has debited the agent with the amount is not sufficient (*i*).

SECT. 6.—*Construction of Policy.*

SUB-SECT. 1.—*General Rules.*

General rules of construction.

1047. Fire policies assume very different forms (*k*), and it is necessary to consider the rules of construction applicable to them. These rules are generally the same as in marine policies (*l*), and it is therefore sufficient to direct attention only to a few of them. Evidence of usage is admissible to explain an ambiguity or to annex an incident to the contract if not inconsistent with its express terms (*m*). Words must generally receive their ordinary meaning (*n*).

(*h*) *Acey* v. *Fernie* (1840), 7 M. & W. 151.

(*i*) *Pritchard* v. *Merchant's and Tradesman's Life Assurance Society* (1858), 3 C. B. (N. S.) 622.

(*k*) The ordinary policy generally begins with a statement to the following effect:—

This Policy of Assurance, Witnesseth, That the Assured having paid or agreed to pay the Company, the sum of £ for Insuring against Loss or Damage by Fire, as hereinafter mentioned, the Property hereinafter described in the sum or several sums following, namely:—

The Company hereby agree with the Assured (but subject to the Conditions printed on the back hereof, which are to be taken as part of this Policy) that the Capital Stock, Estates, and Securities of the Company shall be liable to pay or make good unto the Assured any loss or damage by fire to the Property above described, which shall or may happen between the day of One thousand Nine hundred and and Four o'clock in the afternoon of the day of One thousand Nine hundred and or before Four o'clock in the afternoon of the last day of any subsequent period in respect of which the Assured shall pay, and the Company shall accept, the sum required for the renewal of this Insurance, to an amount not exceeding in respect of the matter or matters above specified the sum or sums set opposite thereto respectively, and not exceeding in the whole the sum of £ .

The policy sometimes contains a condition that the insurance shall not be in force until the premium is paid; but in its absence no such condition will be implied (*Kelly* v. *London and Staffordshire Fire Insurance Co.* (1883), Cab. & El. 47). In *Roberts* v. *Security Co.*, [1897] 1 Q. B. 111, C. A., where the policy recited that the premium had been paid, the company was held estopped from denying that it had been; compare that case with *Equitable Fire and Accident Office, Ltd.* v. *The Ching Wo Hong*, [1907] A. C. 96, P. C., where it was held that a similar recital in a policy did not estop the insurers, and where doubts were thrown on the correctness of the decision in the former case. See also title ESTOPPEL, Vol. XIII. pp. 365 *et seq.*

(*l*) See pp. 342 *et seq.*, *ante*.

(*m*) See p. 344, *ante*.

(*n*) See p. 342, *ante*. The word "gas" when mentioned in a policy *primâ facie* means gas used for ordinary illuminating purposes (*Stanley* v. *Western Insurance Co.* (1868), L. R. 3 Exch. 71); compare *Thompson* v. *Equity Fire Insurance Co.*, [1910] A. C. 592, P. C.) (meaning of "stored on the premises"). As to the meaning of "civil commotion" or "usurped power" in the ordinary clause "that no loss will be paid on fires occasioned by any invasion, foreign enemy, riot, civil commotion or any military or usurped power," see *Drinkwater* v. *London Assurance Corporation* (1767), 2 Wils. 363; *Langdale* v. *Mason* (1780), 2 Marshall on Marine Insurance, 3rd ed., p. 793. As to the meaning of

SECT. 6. Construction of Policy.

Absence of ambiguity.

1048. Where there is no ambiguity, full effect must be given to every provision contained in the policy, although it may be one which the assured would have rejected had he carefully looked at the policy (*o*). Greater weight must be given to a written clause than to a printed one, and if a printed clause be absolutely inconsistent with a written one no effect will be given to the former (*p*).

Limit to matters *ejusdem generis*.

The rule (*q*) applicable to other instruments that, when a particular enumeration of causes is followed by such words as "or other," the latter expression ought, if not enlarged by the context, to be limited to matters *ejusdem generis* with those especially enumerated, applies also to fire policies. Its application is limited, however, to cases where the enumeration consists of particular matters belonging to a class or *genus*, and where, therefore, the general words that follow the enumeration may be properly held to include only things or causes included in that class or *genus* (*r*).

Again, where an ambiguity cannot be removed by any other rule of construction, the maxim *Verba chartarum fortius accipiuntur contra proferentem* will be applied (*s*).

Where there is a latent ambiguity as to the subject-matter of insurance, extrinsic evidence is admissible for the purpose of identifying it (*t*).

SUB-SECT. 2.—*Conditions in the Policy.*

Certain conditions in the policy.

1049. Modern policies of fire insurance contain a great number of conditions which are made conditions precedent (*u*) to the liability

"linen," and incidentally of "stock in trade," see *Watchorn* v. *Langford* (1813), 3 Camp. 422. In the case of a policy on a restaurant, the roof of which was decorated with stained glass, it was held that the word "building" did not include stained glass (*Royal Insurance Co.* v. *Westminster Fire Insurance Co.* (1877), *Post Magazine*, 22nd January). See as to this word and other words of description common in policies, title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 175.

(*o*) *Beacon Life and Fire Assurance Co.* v. *Gibb* (1862), 1 Moo. P. C. C. (N. S.) 73; compare *Pearson* v. *Commercial Union Assurance Co.* (1876), 1 App. Cas. 498; and p. 342, *ante*.

(*p*) *Robertson* v. *French* (1803), 4 East, 130, 135; *Hydarnes Steamship Co.* v. *Indemnity Mutual Marine Assurance Co.*, [1895] 1 Q. B. 500, C. A. In *Pearson* v. *Commercial Union Assurance Co.*, *supra*, the fire policy was on the hull of the steamship *Indian Empire*, lying in the Victoria Dock with liberty to go into dry dock and light the boiler fires once or twice during the currency of the policy. It was held that the policy protected the vessel in the Victoria Dock or any dry dock, and also while *in transitu* to a dry dock, but that the risk was limited to the transit, and did not extend to the time during which the ship lay in the river not for the purpose of that transit.

(*q*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 468.

(*r*) See Lord WATSON'S judgment in *Sun Fire Office* v. *Hart* (1889), 14 App. Cas. 98, 103; see p. 347, *ante*.

(*s*) *Birrell* v. *Dryer* (1884), 9 App. Cas. 345; *Thomson* v. *Weems* (1884), 9 App. Cas. 671, 687; *Barnard* v. *Faber*, [1893] 1 Q. B. 340, C. A.; and see p. 347, *ante*. But as regards any special provision in a policy, the question whether the insurer or the assured are the *proferentes* has also to be determined (*Birrell* v. *Dryer*, *supra*).

(*t*) *Hordern* v. *Commercial Union Assurance Co.* (1887), 56 L. T. 240, P. C.; and see titles CONTRACT, Vol. VII., p. 523; DEEDS AND OTHER INSTRUMENTS, Vol. X. p. 453; and p. 343, *ante*.

(*u*) As to whether these are to be construed as conditions precedent, see *London Guarantie Co.* v. *Fearnley* (1880), 5 App. Cas. 911; and p. 538, *post*.

SECT. 6. Construction of Policy.

of the insurers, and which often only state what would otherwise be implied by law. Some of the ordinary conditions (*v*) have already been sufficiently discussed (*x*), and others are considered later (*y*), but it is convenient here to make a few observations on the following conditions which in some form usually occur:—

Assignment of property.

This policy ceases to be in force as to any of the property hereby insured, which shall pass from the insured to any other person otherwise than by Will or operation of law, unless notice thereof be given to the Company and the subsistence of the insurance in favour of such other person be declared by a memorandum indorsed thereon by or on behalf of the Company.

As to this condition, it is to be observed that it does not apply to cases where the assured merely gives a lien or charge on or mortgages the property insured.

Fraud.

If the claim be in any respect fraudulent, or if any fraudulent or false plan, specification, estimate, deed, book, account, entry, voucher, invoice, or other document, proof or explanation be produced or given, or if any fraudulent means or devices are used by the Insured, or by anyone acting on his behalf to obtain any benefit under this Policy, or if any false statutory declaration be made or used in support thereof, or if the fire be occasioned by or through the procurement or with the knowledge or connivance of the Insured, all benefit under this Policy is forfeited.

By this condition the insurers are exempted from liability, not only where the contract has been induced by fraudulent misrepresentation, but also where the assured is guilty of fraud in presenting or proving his claim, and it is a question of fact whether by claiming an excessive amount from the insurance office the assured has been guilty of fraud within the meaning of the condition (*z*).

Double insurance.

1050. A policy sometimes contains a condition compelling the assured to give notice of any additional insurances by him or on his behalf. The following is an example of such a condition:—

No claim shall be recoverable if the property insured be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the company, in writing, and allowed by indorsement hereon, provided that on such notice being given after the issue of the policy, it shall be optional with the company to cancel the same, returning the rateable premium for the unexpired term thereof, and in case of the assured holding any other policy on the same property subject to average, then this policy is declared subject to average in the same manner (*a*).

This condition applies only to a case where the other insurance has become effective, and not to the case where that insurance has failed to attach on account of the non-payment of the premium or

(*v*) The ordinary conditions, incorporated with verbal modifications, in most modern policies, are set out in Bunyon, Law of Fire Insurance, 5th ed., pp. 6 *et seq.*

(*x*) See p. 526, *ante*.

(*y*) See pp. 534, 537, 538, *post*.

(*z*) *Levy* v. *Baillie* (1831), 7 Bing. 349; *Britton* v. *Royal Insurance Co.* (1866), 4 F. & F. 905; *Chapman* v. *Pole* (1870), 22 L. T. 306; compare *Haigh* v. *De La Cour* (1812), 3 Camp. 319 (where there was fraudulent over-valuation in the policy itself).

(*a*) Compare *Australian Agricultural Co.* v. *Saunders* (1875), L. R. 10 C. P. 668, Ex. Ch. As to contribution in case of double insurance, see p. 536, *post*. As to average, see p. 540, *post*.

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for some other reason (*b*). It seems, however, that the condition will apply where the other insurance is voidable on the ground of fraud or otherwise, and has not been avoided before the loss; though it may be otherwise where it has been avoided by the insurers.

Waiver of condition.

1051. In the contract of fire insurance, just as in any other contract, any condition or breach of condition may be waived by the insurers either by express agreement or conduct, for example, by the acceptance of a renewal premium after notice of a breach (*c*); and where it is stated that in case of breach of a condition the policy will be void or forfeited, this will be generally construed to mean voidable and not absolutely void (*d*). Where a policy is voidable on the ground of concealment or want of good faith in the assured or, it seems, for any other cause, it will be set aside in an action brought for that purpose by the insurers upon the circumstances coming to their knowledge (*e*).

SUB-SECT. 3.—*Regard to be had to Proximate Cause of Loss.*

Causa proxima non remota spectatur.

1052. The assured must prove that fire or some peril included in the policy was the proximate cause of the loss (*f*). Thus a policy against loss by fire does not cover a loss arising from the atmospheric concussion caused by an explosion of gunpowder at a distance (*g*).

Meaning of loss by "fire."

1053. In an ordinary fire policy the insurers undertake to indemnify the assured against any loss or damage by fire to any property described in the policy. A loss by fire means a loss by ignition; and damage by heating where nothing has caught fire, in the ordinary sense of that expression, is not sufficient to make the insurers liable in the absence of any special clauses in the policy. Thus where a policy is against fire in a manufactory, and from the negligence of a servant of the assured through not opening a register, smoke and heat from a stove used in the manufactory are forced into a room and do damage to goods, the insurers are not liable (*h*). On the other hand, the insurers will be liable if any of the property insured or property near it has caught fire and the property insured is

(*b*) *Equitable Fire and Accident Office, Ltd.* v. *The Ching Wo Hong*, [1907] A. C. 96, P. C.; *Australian Agricultural Co.* v. *Saunders* (1875), L. R. 10 C. P. 668, Ex. Ch.

(*c*) *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265, C. A.; *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1876), 1 Q. B. D. 563, Ex. Ch.; *Jones* v. *Bangor Mutual Shipping Insurance Society* (1889), 61 L. T. 727; and see p. 539, *post*, and cases cited p. 549, *post*. See also title CONTRACT, Vol. VII., p. 435.

(*d*) *Armstrong* v. *Turquand* (1858), 9 I. C. L. R. 32, *per* CHRISTIAN, J., at pp. 45—47.

(*e*) *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363; *British Equitable Insurance Co.* v. *Musgrave* (1887), 3 T. L. R. 630; compare *British Equitable Insurance Co.* v. *Great Western Rail. Co.* (1868), 38 L. J. (CH.) 132 (all cases of life insurance). See, generally, titles EQUITY, Vol. XIII., pp. 52, 62; GUARANTEE, Vol. XV., p. 543; MISREPRESENTATION AND FRAUD.

(*f*) For the general treatment of this rule, see pp. 437 *et seq.*, *ante*.

(*g*) *Everett* v. *London Assurance* (1865), 19 C. B. (N. S.) 126; *Marsden* v. *City and County Assurance Co.* (1866), L. R. 1 C. P. 232, and see p. 532, *post*. Compare *Stanley* v. *Western Insurance Co.* (1868), L. R. 3 Exch. 71.

(*h*) *Austin* v. *Drew* (1815), 4 Camp. 360; (1816), 6 Taunt. 436.

damaged by the heat thus engendered. In cases of loss by lightning, where the subject-matter insured has been set on fire, the loss is evidently covered by the policy; but when the injury done does not appear to be the result of fire it seems that the insurers will not be liable, and therefore it is usual to insert a provision in the policy expressly covering "losses by lightning" (*i*).

Indirect consequences of fire.

1054. Damages which result from, but are not the direct consequence of, a fire are not generally recoverable unless specifically insured. Thus loss of profits, though undoubtedly caused by a fire, is too remote to be recoverable unless specifically insured, and the same doctrine applies to loss of rent (*j*), for which reason it is an almost invariable custom specifically to insure loss of rent to cover a period during which the insured premises may have to be rebuilt. There are, however, certain consequential losses so necessarily connected with the fire that they are, whether by law or usage, generally recoverable. Thus a loss resulting from a *bonâ fide* effort to put out a fire, for example, damage by water or by throwing articles of furniture out of the window, and probably the loss of goods by theft in the course of removal during the fire, and other similar losses, seem to be covered by the policy (*k*).

Metropolitan Fire Brigade Act, 1865.

1055. By the Metropolitan Fire Brigade Act, 1865 (*l*), the officer in charge of the brigade has power to break into and pull down premises for the purpose of putting an end to the fire, and damage done by the brigade in the due execution of their duties is to be deemed damage within the meaning of any fire policy. The policy usually contains a condition that the insurers will bear a proportionate part of the expenses of extinguishing a fire, but in the absence of such a condition the insurers would not be liable in respect of such expenses.

Wilful ignition.

1056. One who wilfully sets fire to the property insured is, of course, precluded from recovering under his policy, but an assured is entitled to recover for a loss occasioned by his own negligence (*m*); moreover, by reason of the principle that regard must be had to the proximate cause of the loss, the insurers would be liable for a loss by fire occasioned by the negligence or (in the absence of an exception of incendiarism) the wilful acts of the servants of the assured or any third party (*n*). Thus even if the insured premises are set on fire by the wife of the assured, provided this is without

(*i*) Bunyon, Law of Fire Insurance, 5th ed., p. 89.

(*j*) *Re Wright and Pole* (1834), 1 Ad. & El. 621; *Menzies* v. *North British Insurance Co.* (1847), 9 Dunl. (Ct. of Sess.) 694; compare *Wilson* v. *Jones* (1867), L. R. 2 Exch. 139, Ex. Ch.

(*k*) See *Stanley* v. *Western Insurance Co.* (1868), L. R. 3 Exch. 71, *per* KELLY, C.B., at p. 74; Phillips, Law of Insurance, s. 1098 a. Fire policies often contain special conditions as to damage caused or expenses incurred by the removal of goods from imminent destruction, or by theft on the occasion being covered by the insurance (Bunyon, Law of Fire Insurance, 5th ed., p. 94).

(*l*) 28 & 29 Vict. c. 90, s. 12. See, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) *Jameson* v. *Royal Insurance Co.* (1873), 7 I. R. C. L. 126.

(*n*) *Busk* v. *Royal Exchange Assurance Co.* (1818), 2 B. & Ald. 73; *Sadler* v. *Dixon* (1841), 8 M. & W. 895, Ex. Ch.

SECT. 6. Construction of Policy.

his knowledge or consent, this will not prevent his recovering his loss upon an ordinary fire policy (*o*).

Loss by explosion.

1057. If a policy contains an exception exempting the company from loss or damage by explosion, the insurers will not be liable for damage done by an explosion occurring during a fire, whether resulting from the shock of the explosion or from a further fire occasioned by it, although they will be liable for damage directly caused by a fire which gave rise to the explosion (*p*).

Loss in consequence of incendiarism.

If loss "occasioned by or in consequence of incendiarism" is excluded, and the property insured is burnt by an incendiary fire spreading from other premises, the assured is not entitled to recover (*q*). Similarly in case of a policy against damage "from any cause except fire or breakage during removal," if loss is occasioned by the violence of a mob during removal to escape damage by fire which has broken out on adjoining premises, the insurers will be liable, because the loss is proximately caused not by the fire or the removal, but by the violence of the mob (*r*).

SECT. 7.—*Representation and Warranty.*

SUB-SECT. 1.—*Representation and Concealment.*

Contract *uberrimæ fidei.*

1058. The contract of fire insurance is a contract *uberrimæ fidei*—a contract based upon the utmost good faith—and if the utmost good faith be not observed by either party, the contract may be avoided by the other (*s*). All the rules of marine insurance relating to misrepresentation and concealment, and also those relating to warranties, apply to fire insurance, except so far as they are excluded or modified by the terms and conditions of the policy, and there are only a few points which need here be noticed (*t*).

Materiality of facts concealed or represented.

1059. Whether a fact concealed or represented be or be not material is a question of fact. Any circumstances tending to make the premises insured specially liable to be burned must be disclosed (*a*). The fact that many incendiary fires have taken place in the neighbourhood of the premises insured, if known to the assured and unknown to the insurers, may be a material fact. If a

(*o*) *Midland Insurance Co.* v. *Smith* (1881), 6 Q. B. D. 561.

(*p*) *Stanley* v. *Western Insurance Co.* (1868), L. R. 3 Exch. 71. It may perhaps, be doubted whether regard ought not to be had only to the proximate cause; see p. 530, *ante*.

(*q*) *Walker* v. *London and Provincial Insurance Co.* (1888), 22 L. R. Ir. 572.

(*r*) *Marsden* v. *City and County Assurance Co.* (1866), L. R. 1 C. P. 232. If a loss occurs through a peril akin to that which is insured against, the insurers, although not legally liable, may be justified as a matter of business in paying. Thus under a policy excluding liability for explosion, the directors of an insurance company were held to be justified in paying for damage due to concussion caused by gunpowder exploding on a ship which had caught fire (*Taunton* v. *Royal Insurance Co.* (1864), 2 Hem. & M. 135).

(*s*) *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531, *per* BLACKBURN, J., at p. 538, citing on this point *New York Bowery Fire Insurance Co.* v. *New York Fire Insurance Co.* (1837), 17 Wendell (New York), 359. Compare title GUARANTEE, Vol. XV., p. 539, and see title MISREPRESENTATION AND FRAUD.

(*t*) See pp. 404, 416, *ante*.

(*a*) *Bufe* v. *Turner* (1815), 6 Taunt. 338.

person proposing an insurance states to the insurance office untruly that the same risk has been accepted by another office at a particular premium, and so induces the former office to accept it at the same rate, the policy so obtained will be avoided by such misrepresentation, not on the ground that it has affected the risk, but because it has induced a confidence without which the party would not have acted (*b*). Again, in the case of reinsurance, if the company reinsuring represent that they will retain a portion of the risk and subsequently reinsure to its full extent without retaining themselves any part of the risk, the non-communication of this fact will avoid the policy (*c*).

Time at which fact is material.

1060. If a statement made by the assured, though true at the time it is made, becomes untrue before the contract of insurance is complete, the insurers will be exempted from liability (*d*). On the other hand, if the statement is true at the time when there is a binding contract of insurance, the fact that it becomes untrue before the policy is actually issued seems to be immaterial, just as in the case of marine insurance any misrepresentation or concealment after the slip is signed is no defence to an action on the policy (*e*).

Knowledge of agent, knowledge of principal.

1061. It follows from the general principles of agency that the knowledge of the agent employed to effect an insurance is deemed to be the knowledge of the assured, so that if such agent fails to disclose a material fact not known to the principal, but known to the agent, or if the agent is guilty of misrepresentation, the policy will be void (*f*). Questions sometimes of considerable difficulty arise as to whether a person through whose agency an insurance is effected is to be considered the agent of the assured or the agent of the insurance office. Thus if the proposer allows an agent of the insurer to insert the answers to questions in a proposal form, he may become the agent of the proposer, and cease to be the agent of the insurer (*g*).

(*b*) *Sibbald* v. *Hill* (1814), 2 Dow, 263, H. L., *per* Lord ELDON, at p. 266.

(*c*) *Trail* v. *Baring* (1864), 4 Giff. 485.

(*d*) *Re Marshall and Scottish Employers' Liability and General Insurance Co.* (1901), 85 L. T. 757; *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727, C. A., *per* LINDLEY, L.J., at pp. 732, 733 (a proposal was made to an insurance company for an insurance on the life of the proposer, who made, on a form issued by the company, statements as to his state of health and other matters, and a declaration that the statements were true and were to be taken as the basis of the contract. The proposal was accepted at a specified premium, but upon terms that no insurance should take effect till the premium was paid. Before tender of the premium, there was a material alteration in the state of the health of the proposer, and the company refused to accept the premium or to issue a policy. Held, that the nature of the risk having been altered at the time of the tender of the premium, there was no contract binding the company to issue a policy). It is clear that the principle of this decision is equally applicable to fire insurance. As to the law in case of marine insurance, see pp. 404 *et seq.*, *ante*.

(*e*) See p. 406, *ante*.

(*f*) *Blackburn, Low & Co.* v. *Vigors* (1887), 12 App. Cas. 531. The assured is not bound to disclose what is known to the company, even under an express condition (*Pimm* v. *Lewis* (1862), 2 F. & F. 778); and see p. 405, *ante*. See also title AGENCY, Vol. I., pp. 211, 215, 216.

(*g*) *Bancroft* v. *Heath* (1900), 6 Com. Cas. 137, 139, C. A.; *Biggar* v. *Rock Life*

SECT. 7. Representation and Warranty.

If the agent of the insurance office takes upon himself the responsibility of surveying and describing the property, any misdescription by him of the property cannot be imputed to the assured, and if the property is consequently misdescribed in the policy, the instrument, if necessary, may be rectified (*h*).

SUB-SECT. 2.—*Warranties.*

Warranty.

1062. A warranty must be exactly complied with (*i*), whether it be material to the risk or not. Thus where it is warranted that the rate is the same as other companies have charged (*i*), or that no steam engine or any description of fire-heat (other than common fireplaces) shall be introduced, such a warranty amounts to a condition, and the policy is voidable upon breach of it although the breach may not in any degree increase the risk (*k*).

The proposal.

1063. It is usual to require the assured to sign a written proposal containing certain statements and answers to certain questions, *e.g.*, as to nature of neighbouring risks or whether the assured has had a fire claim against any office. Such statements and answers are representations, and if they are not substantially true the policy will be voidable, but if a proposal is referred to and incorporated in or made the basis of the policy, then the statements and answers amount to warranties, and their strict and literal truth is a condition precedent to the liability of the insurers whether or not they are material to the risk. It is a question of construction whether the statements and answers contained in the proposal are so referred to in the policy as to constitute each of them a warranty, or whether they merely amount to representations (*l*).

Warranties of representations.

Description of property.

1064. In the absence of any condition in the policy affecting the question, the policy is voidable if the description of the insured

Assurance Co., [1902] 1 K. B. 516; *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, C. A.; *Re Universal Non-Tariff Fire Insurance Co., Forbes & Co.'s Claim* (1875), L. R. 19 Eq. 485; and see *Hough* v. *Guardian Fire and Life Assurance Co.* (1902), 18 T. L. R. 273, and p. 549, *post.* In consequence of these decisions some companies insert in their policies a condition that the knowledge of their agents shall not be deemed the knowledge of the principals.

(*h*) *Re Universal Non-Tariff Insurance Co., Forbes & Co.'s Claim, supra;* compare *Pimm* v. *Lewis* (1862), 2 F. & F. 778. As to rectification, see, further, p. 403, *ante.*

(*i*) *Barnard* v. *Faber*, [1893] 1 Q. B. 340, C. A.; *Bancroft* v. *Heath* (1900), 6 Com. Cas. 137. For a warranty against duplicate insurance, see *Australian Agricultural Co.* v. *Saunders* (1875), L. R. 10 C. P. 668, Ex. Ch.

(*k*) *Glen* v. *Lewis* (1853), 8 Exch. 607; and see cases cited in note (*q*), p. 535, *post.*

(*l*) *Thomson* v. *Weems* (1884), 9 App. Cas. 671; *Anderson* v. *Fitzgerald* (1853), 4 H. L. Cas. 484. Nevertheless, a reasonable construction must be given even to a warranty. Thus where there was a warranty that certain cotton mills were worked by day only, it was held that this was not infringed by keeping the engines and unconnected shafting going all night, the mill and machinery not being substantially worked (*Mayall* v. *Mitford* (1837), 6 Ad. & El. 670; *Whitehead* v. *Price* (1835), 2 Cr. M. & R. 447). So if a certain premium mentioned in the insurance policy is applicable only to buildings where no fire is kept, this means habitually kept, and the mere casual keeping of a fire does not avoid the policy (*Dobson* v. *Sotheby* (1827), Mood. & M. 90).

premises is incorrect in any material degree (*m*), and when the description of the property insured takes the form of a warranty it must be strictly and literally true. Thus if the policy after the description of the property contains the clause "warranted that the mill is conformable to the first class of mill rates," and in fact the mill is not conformable to such first class of mill rates, the policy will be held void, although it be clearly proved that the deviation from the warranty did not at all increase the risk (*n*).

Goods on certain premises.

1065. If goods are insured as being on certain premises, the insurers will not be liable for loss or damage occurring to them when removed from the premises for any cause whatever, but the policy will attach again when the goods are brought back to the premises (*o*).

Alteration of risk during cover.

1066. The question sometimes arises whether the words of description in the policy amount to a warranty that the risk shall continue unaltered during the currency of the policy. The result of the cases seems to be that in the absence of fraud or some express condition in the policy, an alteration in the subject-matter of insurance during the currency of a policy does not affect its validity further than this, that, if the alteration in fact occasions the loss, such loss is not covered by the policy (*p*).

Usually, however, the policy contains an express condition that if any alteration be made by which the risk is increased, or any other kind of alteration, the same must be notified to and allowed by the insurer, otherwise the policy will be void. In such case any alteration of the kind stipulated, not duly notified and allowed, would avoid the policy, whether in the event it caused a loss or not, and any implied condition respecting alterations is excluded by the express terms (*q*).

(*m*) *Sillem* v. *Thornton* (1854), 3 E. & B. 868.

(*n*) See the judgment of Lord ELDON, L.C., in *Newcastle Fire Insurance Co.* v. *Macmorran & Co.* (1815), 3 Dow, 255, H. L.

(*o*) *Gorman* v. *Hand in Hand Insurance Co.* (1877), 11 I. R. C. L. 224. In *Pearson* v. *Commercial Union Assurance Co.* (1873), L. R. 8 C. P. 548, Ex. Ch.; affirmed (1876), 1 App. Cas. 498, there was a time policy against fire described as "then lying in the Victoria Docks with liberty to go into dry dock and light the boiler fires once or twice during the currency of the policy." BLACKBURN, J., in the Exchequer Chamber, expressed the opinion that although a deviation in the case of a marine policy avoids it from the time of the deviation, this doctrine might not apply to a fire policy, and that there was no reason why the ship should not be taken out of the place to which the policy attached, and so cease for a time to be covered, and then brought back to it, when the risk would again attach (L. R. 8 C. P. at p. 549). See also, on this point, *Grant* v. *Ætna Insurance Co.* (1862), 15 Moo. P. C. C. 516.

(*p*) *Stokes* v. *Cox* (1856), 1 H. & N. 533, Ex. Ch., *per* WILLES, J., at p. 538 (see note (*q*), *infra*).

(*q*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 442. In *Pim* v. *Reid* (1843), 6 Man. & G. 1, the policy did not contain such a condition as is above mentioned, and the alteration in the business carried on on the premises insured was held not to vitiate the policy. The judgment in that case was commented on, and the case distinguished in *Sillem* v. *Thornton*, *supra* (where the premises were altered after the commencement of the risk but before the execution of the policy), and the court expressed an opinion (*ibid.*, at p. 882), which, however, was an extra-judicial opinion, that if the

SECT. 8. Contribution.

SECT. 8.—*Contribution.*

Contribution.

1067. Where several fire policies are effected by one person on the same property with several insurance companies, the assured can, in the absence of any stipulation to the contrary contained in the policies, recover from any one company the whole amount which it has insured, without taking into account the amount he has insured with the other companies, and he can then claim the remainder of the loss from the latter.

The rule of contribution applicable to such fire insurances is the same as that which prevails in the cases of marine insurance and of co-sureties (*r*). The insurers amongst themselves contribute equally, if each company is an insurer for an equal amount, and, if they are insurers in different amounts, then each company contributes in proportion to the amount it has insured. Thus if company A. has insured property in the amount of £1,000 and B. in £500, and the loss is £1,000, the assured can recover from A. the whole of the £1,000, and then B. would have to pay A. one-third of £1,000. Or, if the assured first claims from B., and recovers from B. £500, he will be entitled to recover from A. the remainder of the loss, namely, £500, and B. will then be entitled to recover from A. £500, less one-third of £1,000 (*s*).

Express modification of law.

1068. Fire policies usually contain conditions which exclude or modify the application of the above-stated rules of law.

They sometimes require the assured to notify the existence of other insurances on the same property (*t*). Further, they usually contain conditions which limit the liability of the insurers in cases where several policies have been effected on the same property. These conditions provide that, in the cases to which they apply, the responsibility of each insurance company shall be limited to the rateable proportion of the loss. This means that each company

premises were altered by the assured after the making of the policy so as to make their condition vary from the description and to increase the risk, the liability of the insurer ceases to attach. The truth of this latter proposition was, however, denied by WILLES, J., during the argument in *Stokes* v. *Cox* (1856), 1 H. & N. 533, 538, Ex. Ch.; and the better opinion seems to be that the alteration has, in the absence of any condition to the contrary in the policy, only the effect of exempting liability for loss or damage occasioned by such alteration (see Leake, Law of Contracts, 5th ed., p. 275; *Thompson* v. *Hopper* (1858), E. B. & E. 1038, Ex. Ch., *per* WILLES, J., at p. 1049). But now this discussion is of scarcely any importance, since modern policies always contain the above-mentioned condition. As regards the construction of that condition or conditions to a like effect, see *Shaw* v. *Robberds* (1837), 6 Ad. & El. 75; *Barrett* v. *Jermy* (1849), 3 Exch. 535; *Glen* v. *Lewis* (1853), 8 Exch. 607.

(*r*) See titles EQUITY, Vol. XIII., p. 30; GUARANTEE, Vol. XV., pp. 526 *et seq.*; and p. 381, *ante*.

(*s*) *Deering* v. *Winchelsea* (*Earl*) (1787), 2 Bos. & P. 270, and notes thereto in 2 White & Tud. L. C., 7th ed., 540; *Craythorne* v. *Swinburne* (1807), 14 Ves. 160; *Whiting* v. *Burke* (1871), 6 Ch. App. 342; *Pendlebury* v. *Walker* (1841), 4 Y. & C. (EX.) 424, 441 (co-sureties); *Newby* v. *Reed* (1763), 1 Wm. Bl. 416 (marine insurance); *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1877), 5 Ch. D. 569, C. A. (especially the judgment of JAMES, L.J., at p. 581, *ibid.*) (fire insurance).

(*t*) See p. 529, *ante*.

shall be liable in proportion to the amount it has insured. Thus, if a person has insured goods in a certain office for £3,000 and in another office for £7,000, then on sustaining a partial loss by fire he is entitled to recover from the former office three-tenths of the loss, and from the latter seven-tenths.

Limit of liability.

1069. The conditions so limiting the liability of the insurers in case of several insurances on the same property are in various forms. The following is a usual form :—

Form.

If at the time of any loss or damage happening to any property hereby insured there be any other subsisting insurance, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage (*a*).

Construction of clause.

This condition is not, however, to be literally construed, for it could not be intended to apply to insurances effected by other persons on the same property on their own behalf. It could only be intended to apply to insurances effected on the same property on behalf of the assured. It could not be meant to apply, for example, to insurances by a tenant for life and a remainderman, or a first mortgagee and a second mortgagee insuring separate interests in the same property. The condition must be read in a sensible way, and it cannot be assumed that insurance offices intended to destroy the value of the contract of indemnity by reason of the accidental contract of somebody else, which had no connection with the subject-matter of the contract or the price paid for the insurance (*b*).

Insurance on same property by different persons.

1070. The mode in which the principles of subrogation and contribution are to be applied in cases where persons having different interests have insured the same property is explained in the passage from the judgment already quoted (*c*).

(*a*) See *Nichols & Co.* v. *Scottish Union and National Insurance Co.* (1885), 2 T. L. R. 190.

(*b*) *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1877), 5 Ch. D. 569, C. A., *per* JESSEL, M.R., at p. 577. Modern policies sometimes limit the conditions to insurance "effected by or on behalf of the insured"; see p. 538, *post*.

(*c*) See pp. 494 *et seq.*, *ante*; *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.*, *supra*, *per* MELLISH, L.J., at p. 583. The facts of this important case, so far as they are material to the point under consideration, are as follows:—B. & Co., wharfingers, had by policies of insurance insured against loss or damage by fire in certain sums grain and seed "the assured's own interest, or on commission for which they were responsible." Part of the grain stored in the warehouses of B. & Co. belonged to R. & Co., merchants, and by the usage of the trade B. & Co., as warehousemen, were responsible to R. & Co. for any loss or damage to the grain by fire. R. & Co. had insured their grain by fire policies with other insurance companies. A fire destroyed a quantity of the grain so stored by R. & Co. with B. & Co. B. & Co. were paid in full by the several insurance companies, and the suit was instituted to determine the liability of the insurance companies *inter se*. It was held that B. & Co. were primarily liable for the loss, but, being indemnified by their insurers, the latter were ultimately liable, and the companies with whom R. & Co. were insured were not liable to the other companies to contribute to the loss. See also *Andrews* v. *Patriotic Insurance Co. of Ireland* (No. 2) (1886), 18 L. R. Ir. 355 (where the

SECT. 8. Contribution.

Since that judgment (*d*) was delivered many insurance offices have modified the condition now under consideration by expressly confining it to cases where the property is insured in several offices by or on behalf of the same assured. At the same time the offices have entered into an agreement that as between themselves any loss shall be apportioned rateably among the insurance offices concerned without regard to the rights or liabilities of the assured *inter se* (*e*).

Several policies in different forms.

1071. Very difficult questions arise as to contribution by insurance companies where there are several policies in different forms and on different items of property. For instance, there may be specific policies where the subject-matter insured by one policy is combined with the subject-matter insured by another policy; or there may be policies containing the condition as to average and specific policies not containing such a condition. Such questions have in this country been determined by negotiation between the offices or by arbitration, and there are no English, Scottish, or Irish cases which solve the various difficulties arising in cases of this kind (*f*).

SECT. 9.—*The Adjustment of the Loss.*

SUB-SECT. 1.—*Conditions Precedent to Liability.*

Conditions precedent to liability.

1072. Conditions are always found in fire policies requiring the assured to give notice to the company on the happening of a loss within a specified time (usually fifteen days), to give the best practicable particulars; and it is sometimes stipulated that some formal act must be done to entitle the assured to recover. These requirements should be strictly observed, for if they are so framed as to be conditions precedent to the assured's right to recover that effect will be given to them (*g*).

1073. Whether such stipulations are conditions precedent or not is a question of construction (*h*). Where the policy so provides in

principle of *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1877), 5 Ch. D. 569, C. A., was applied to the case of a landlord and tenant who had effected separate insurances); *Scottish Amicable Heritable Securities Association* v. *Northern Assurance Co.* (1883), 11 R. (Ct. of Sess.) 287; *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), 13 App. Cas. 699.

(*d*) See p. 494, *ante*.

(*e*) Bunyon, Law of Fire Insurance, 5th ed., p. 287.

(*f*) In Bunyon, Law of Fire Insurance, 5th ed., pp. 299—319, the author has stated his own views on the subject, and cites and criticises Phillips, Law of Insurance, ss. 366, 1263.

(*g*) *Roper* v. *Lendon* (1859), 1 E. & E. 825; *Mason* v. *Harvey* (1853), 8 Exch. 819; *Hiddle* v. *National Fire and Marine Insurance Co. of New Zealand*, [1896] A. C. 372, P. C.; *Worsley* v. *Wood* (1796), 6 Term Rep. 710; *Routledge* v. *Burrell* (1789), 1 Hy. Bl. 254; and see p. 528, *ante*. As to extension of time, see *Re Carr and the Sun Fire Insurance Co.* (1897), 13 T. L. R. 186, C. A.

(*h*) See, for example, *London Guarantie Co.* v. *Fearnley* (1880), 5 App. Cas. 911 (proviso in fidelity guarantee for prosecution of defaulting servant; and see p. 534, *ante*). If the condition be "Particulars of loss to be given within fifteen days, in default no claim to be paid until such particulars be given," the latter words prevent the former from being a condition precedent (*Weir* v. *Northern Counties of England Insurance Co.* (1879), 4 L. R. Ir. 689); and see title CONTRACT, Vol. VII., p. 435.

express terms they will, if possible, be so construed (*i*); but the courts will always endeavour to put a reasonable construction on the whole contract, *e.g.*, when the conditions stipulate for such evidence as shall be satisfactory to the directors of the company, this is held to mean such evidence as is sufficient, or as would satisfy reasonable directors (*j*).

Construction of stipulations.

The strict performance of such conditions as are above referred to may be waived, as all others, by the conduct of the parties for whose benefit the conditions are inserted, as where, though the assured has failed to comply with a condition as to notice of loss, the company demands compliance with some condition as to proof (*k*).

Fraudulent claim.

1074. The question whether the claim is fraudulent within the meaning of the usual condition against fraudulent claims (*l*) is one of fact, namely, whether the claim is wilfully false in any substantial respect (*m*).

SUB-SECT. 2.—*Amount Recoverable.*

Valued policies.

1075. Very few fire policies are "valued" policies; in fact they generally contain a stipulation that the assured shall deliver particulars of articles damaged or destroyed, with their estimated value, and the estimated amount of the loss or damage having regard to their several values at the time of the fire, or in some other manner indicate that the insurer's liability is measured by the actual cost of the property destroyed or damaged or its value to the assured immediately before the fire (*n*).

As regards goods and merchandise insured, the insurers are liable to pay an amount equal to their value to the assured immediately before the fire.

In the case of buildings and machinery the amount of the insurer's liability is measured by the cost of repairing the damage, making due allowance (as to which no settled rule can be laid down) for the excess of the value of the new buildings or machinery over the old ones (*o*).

(*i*) See *London Guarantie Co.* v. *Fearnley* (1880), 5 App. Cas. 911; compare *Bradley* v. *Essex and Suffolk Accident Indemnity Society, Ltd.* (1911), 27 T. L. R. 455.

(*j*) *Braunstein* v. *Accidental Death Insurance Co.* (1861), 1 B. & S. 782; *Hiddle* v. *National Fire and Marine Insurance Co. of New Zealand*, [1896] A. C. 372, P. C.; compare *Strong* v. *Harvey* (1825), 3 Bing. 304.

(*k*) See p. 530, *ante*; *Donnison* v. *Employers' Accident and Live Stock Insurance Co.* (1897), 24 R. (Ct. of Sess.) 681 (accident insurance); and see American cases cited, Bunyon, Law of Fire Insurance, 5th ed., p. 219.

(*l*) See p. 529, *ante*.

(*m*) *Goulstone* v. *Royal Insurance Co.* (1858), 1 F. & F. 276, *per* POLLOCK, C.B., at p. 279; *Norton* v. *Royal Fire and Life Assurance Co.* (1885), 1 T. L. R. 460; varied on appeal (1885), *Times*, 12th August, C. A.; compare *Levy* v. *Baillie* (1831), 7 Bing. 349.

(*n*) There is no reason why the valuation in the policy on goods should not be binding, inasmuch as such an instance is not within the Life Assurance Act, 1774 (14 Geo. 3, c. 48), s. 4 (see p. 514, *ante*); and see *Waters* v. *Monarch Fire and Life Assurance Co.* (1856), 5 E. & B. 870, 877, 882. But it seems that the Act of 1774 would prevent effect being given to a valuation in a policy on houses. Sometimes, however, the assured is under a legal obligation, where a house is destroyed by fire, to replace it by a more expensive structure, and in such case it seems that there is nothing in the Act of 1774 to prevent the assured from insuring against such liability.

(*o*) *Vance* v. *Forster* (1841), Ir. Circ. Cas. 47. Losses in the nature of loss of profits are not recoverable unless expressly covered; see p. 521, *ante*.

SECT. 9. The Adjustment of the Loss.

SUB-SECT. 3.—*Arbitration Clauses.*

Arbitration clauses.

1076. There are but few decisions determining the proper mode of estimating the value to the assured of property destroyed or damaged by fire, because wherever there is any dispute as to the amount of loss for which the insurance office is liable, the question is almost always decided by arbitration in accordance with the arbitration clause in the policy.

Some policies contain a clause that in case of dispute as to the amount of the loss the matter shall be referred to arbitration, or that the insurer shall be liable for the loss only determined by arbitration. In others, including almost all modern policies, there is a clause stipulating that in case of any dispute arising under the policy such dispute shall be referred to arbitration, and the obtaining an award shall be a condition precedent to the right to sue. The effect of such clauses and the power of the courts to stay actions under the provisions of the Arbitration Act, 1889 (*p*), have been dealt with elsewhere. It is sufficient here to state that where a cause of action has arisen and fraud is alleged as a defence, the court will not as a rule stay the action, unless the arbitration clause is so framed that an award is made a condition precedent to the right of action, in which case the assured cannot maintain an action on the policy until he has obtained an award (*q*).

SUB-SECT. 4.—*Average.*

Difference between fire and marine insurance on this point.

1077. In treating of marine insurance it has been shown that the underwriter is answerable for such proportion only of the loss as the amount insured bears to the value of the property or of the interest therein of the assured, and that he pays no loss except with reference to the sum on which the premium is paid—the whole sum if the loss be total, some aliquot portion of that sum if the loss be partial. An entirely different rule prevails in fire insurance in the absence of an express stipulation to the contrary. In fire insurance the insurance office is liable up to the amount insured for any loss, whether partial or total. Thus, if the value of the property insured be £10,000 and the amount insured £1,000, and a partial loss occurs of 10 per cent., the fire insurance company will be liable to pay the whole of the £1,000, whereas in the case of marine insurance the underwriters would be liable to pay only 10 per cent. of the £1,000, that is to say, £100.

The average clause.

There are, however, many fire policies which contain what is

(*p*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4; see title ARBITRATION, Vol. I., pp. 444 *et seq.*, 453; *Gaw* v. *British Law Fire Insurance Co.*, [1908] 1 I. R. 245, C. A.

(*q*) *Scott* v. *Avery* (1856), 5 H. L. Cas. 811; *Tredwen* v. *Holman* (1862), 1 H. & C. 72; *Braunstein* v. *Accidental Death Insurance Co.* (1861), 1 B. & S. 782; *Elliott* v. *Royal Exchange Assurance Co.* (1867), L. R. 2 Exch. 237; *Viney* v. *Bignold* (1887), 20 Q. B. D. 172; *Trainor* v. *Phœnix Fire Assurance Co.* (1891), 65 L. T. 825; *Scott* v. *Mercantile Accident and Guarantee Insurance Co.* (1892), 66 L. T. 811, C. A.; *Caledonian Insurance Co.* v. *Gilmour*, [1893] A. C. 85; *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202; *Spurrier* v. *La Cloche*, [1902] A. C. 446, P. C.; *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449; *Kenworthy* v. *Queen Insurance Co.* (1892), 8 T. L. R. 211.

called "the average clause." It places fire insurance in this respect on the same footing as marine insurance, and stipulates that if the property covered by insurance shall at the breaking out of any fire be collectively of a greater value than the sum insured, then the assured shall be considered his own insurer for the difference, and shall bear a rateable share of the loss accordingly (*r*). Such an average clause is rarely found in "specific" policies, that is to say, in policies in which the property insured is specifically described and earmarked; but it is usual in policies which are called "floating" policies, that is to say, on any goods of a certain description which may be from time to time during the currency of the policy on the premises mentioned in the policy.

SECT. 9. The Adjustment of the Loss.

SECT. 10.—*Rights and Duties of Insurers after Loss.*

SUB-SECT. 1.—*Entry on the Premises and Salvage.*

1078. The insurers have, it seems, the right by usage to enter upon the premises for the purpose of ascertaining the damage to the property insured and protecting it from further damage or loss, and to retain possession for a reasonable time; and a condition to that effect is usually inserted in the policy, but if they retain possession for an unreasonable time, they may become liable in damages to the assured (*s*). To enter on the premises.

1079. Fire insurance differs from marine insurance in this respect, that it does not recognise a right upon giving notice of abandonment to recover as for a constructive total loss, though if the insurers pay the whole amount insured they are, by the principles of subrogation, entitled to the salvage, that is to say, to all that remains of the property insured after the fire (*t*). Notice of abandonment

SUB-SECT. 2.—*Reinstatement.*

1080. The sum required to reinstate the insured premises is one thing; the loss which the insurers may be called upon to pay, especially when different interests in the same property have been separately insured, may be quite another (*u*). Fire policies, therefore, always contain a clause giving the insurers the right of reinstatement in lieu of paying the amount of the loss to the insured. The clause is to the effect that the company will reserve to itself the right of reinstatement in preference to the payment of the claim if it should deem the former course to be most Reinstatement.

(*r*) A policy expressed to be "subject to average" implies the above-mentioned average clause (*Acme Wood Flooring Co., Ltd.* v. *Marten* (1904), 9 Com. Cas. 157).

(*s*) *Oldfield* v. *Price* (1860), 2 F. & F. 80, and note (*ibid.*).

(*t*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A., *per* BRETT, L.J. As to the rule in marine insurance, see pp. 480 *et seq.*, *ante*.

(*u*) *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), 13 App. Cas. 699 (where premises were mortgaged to different incumbrancers who insured in separate offices, the value of the premises was sufficient before the fire to pay all the incumbrances, but not sufficient after the fire. The prior incumbrancers accepted a sum sufficient to reinstate the premises but did not reinstate them, and it was held that the plaintiffs, who were subsequent incumbrancers, were entitled to recover to the extent of their loss).

SECT. 10. Rights and Duties of Insurers after Loss.

expedient. The insurers have thus the power of electing to reinstate, and after having so elected are in the same position as if the policy had contained an absolute stipulation to reinstate the premises in the case of fire, and an election once made by the insurers is binding on them and cannot be revoked on the ground that circumstances have intervened making the reinstatement more difficult or expensive (*a*).

Meaning of term.

1081. The term "to reinstate," when applied to property in the nature of chattels, means to replace the property *in statu*, but not necessarily *in situ*. Thus where, by the act of the assured or otherwise, it has been impossible to reinstate the chattels in the place where they were, the insurers are entitled, under a condition empowering them to "reinstate or replace property damaged," to discharge their obligation by making them as good as they were before the fire; and the assured on his part may move them to another place within a reasonable distance from their original position, and then require the insurers either to pay the amount of the damages or to repair them in the place to which they have been removed (*b*).

Statutory provisions as to reinstatement.

1082. Apart from any clause in the policy itself, an insurance office may be required to cause the insurance money to be laid out in rebuilding (*c*). In order to obtain the benefit of this statutory provision (*c*), a person interested must show that he made a distinct request to the office to lay out the money according to the statute (*c*). A demand that the money shall be paid to him or for his benefit, and not to the assured, is not such a request as is required (*c*), nor is the owner entitled himself to rebuild, and then to call upon the insurers to pay the cost incurred (*d*).

(*a*) *Brown* v. *Royal Insurance Co.* (1859), 1 E. & E. 853. This case was decided upon demurrer, *dissentiente* ERLE, J. The court expressly abstained from expressing any opinion as to the amount of damages which could be recovered under the policy. The plea demurred to stated that whilst the defendants were proceeding to reinstate, the premises became dangerous and were caused to be removed by the Commissioners of Sewers under the provisions of the Building Acts, that their dangerous condition was not caused by the fire, and that by their removal reinstatement had been rendered impossible. This plea was held bad on demurrer on the ground that the insurance office having made their election to reinstate were absolutely bound to do that they had elected to do. Some policies contain a condition framed for the purpose of protecting insurers against such contingencies as occurred in *Brown* v. *Royal Insurance Co.*, *supra*. See Bunyon, Law of Fire Insurance, 5th ed., p. 228.

(*b*) *Anderson* v. *Commercial Union Assurance Co.* (1855), 55 L. J. (Q. B.) 146; 148, 149, C. A.

(*c*) Under the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 83, which enacts in substance that it shall be lawful for fire insurance offices, and that they are authorised and required upon the request of any persons interested in the buildings insured, or upon any grounds of suspicion that the owners, occupiers, or other persons who have insured the buildings have been guilty of fraud, or of wilfully setting their houses or other buildings on fire, to cause the insurance money to be expended as far as the same will go towards reinstating the buildings, unless the party claiming such insurance money shall within sixty days next after the adjustment of the claim give a sufficient security that the insurance money shall be expended as aforesaid. As to the application of this provision, see note (*d*), p. 543, *post*.

(*d*) *Simpson* v. *Scottish Union Insurance Co.* (1863), 1 Hem. & M. 618. It seems doubtful whether the insurance office can be compelled by mandamus

SECT. 10. Rights and Duties of Insurers after Loss.

Tenant's rights.

1083. A tenant cannot, in the absence of special provisions, compel his landlord to apply moneys received from his insurers in reinstating the premises, although the tenant himself remains liable to pay rent (*e*). He can, however, apply under the statute above referred to (*ee*), and obtain an injunction to restrain the insurers from paying the insurance moneys to the landlord without sufficient security that he will rebuild (*f*).

SUB-SECT. 3.—*Rights on Assignment of Policy.*

Assignment of policy.

1084. When there has been an absolute assignment in writing of the policy or the money due thereunder, and the requisite notice thereof in writing has been given to the insurers, the assignee is entitled to pursue, in his own name, all the remedies of the assured (*g*). If the assignment is disputed the insurers should apply for relief by way of interpleader (*h*).

Part IV.—Life Insurance.

SECT. 1.—*Nature of Life Insurance and Insurable Interest.*

SUB-SECT. 1.—*Definition of Life Insurance. Not a Contract of Indemnity.*

Definition of life insurance.

1085. Life insurance may be defined as a contract by which the insurer agrees upon the death of the person whose life is insured (commonly called the life insured) to pay a given sum in consideration of the payment by or on behalf of the assured during the continuance of the life of certain sums called premiums (*i*).

to reinstate (*Wimbledon Park Golf Club* v. *Imperial Insurance Co.* (1902), 18 T. L. R. 815). The report of this case, however, is unsatisfactory and it is difficult to discover the exact *ratio decidendi*. The above-mentioned enactment (see note (*c*), p. 542, *ante*), which occurs in a Metropolitan Building Act the bulk of which has been repealed, has been held to apply to insurance on buildings in England and Wales generally (*Re Barker, Ex parte Gorely* (1864), 4 De G. J. & Sm. 477, but the correctness of this decision has been doubted; *Westminster Fire Office* v. *Glasgow Investment Society* (1888), 13 App. Cas. 699, *per* Lord WATSON, at p. 716, and see *per* Lord SELBORNE, at p. 713). It was clearly intimated in the last-mentioned case (see pp. 707, 716) that it does not apply to Scotland. See, further, *Re Quicke's Trusts, Poltimore* v. *Quicke*, [1908] 1 Ch. 887; and title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 191, 192.

(*e*) *Leeds* v. *Cheetham* (1827), 1 Sim. 146; *Holtzapffel* v. *Baker* (1811), 18 Ves. 115; *Lofft* v. *Dennis* (1859), 1 E. & E. 474; *Hare* v. *Groves* (1796), 3 Anst. 687.

(*ee*) See note (*c*), p. 542, *ante*.

(*f*) *Wimbledon Park Golf Club* v. *Imperial Insurance Co.* (1902), 18 T. L. R. 815, 816.

(*g*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); R. S. C., Ord. 57, r. 1 (a); *Matthew* v. *Northern Assurance Co.* (1878), 9 Ch. D. 80; see, further, as to assignment, pp. 558 *et seq.*, *post;* and titles CHOSES IN ACTION, Vol. IV., p. 367; EQUITY, Vol. XIII., p. 102.

(*h*) R. S. C., Ord. 57, r. 6; see p. 565, *post;* and title INTERPLEADER, p. 587, *post*.

(*i*) In *Dalby* v. *India and London Life-Assurance Co.* (1854), 15 C. B. 365, Ex. Ch., PARKE, B., at p. 387, says: "The contract commonly called life-assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of due payment of a certain annuity for his life, the amount of the annuity being calculated in the first

SECT. 1. Nature of Life Insurance and Insurable Interest.

The contract differs from other contracts of insurance in this important respect, that it is not a contract of indemnity. This is obvious from the fact that a man may insure his life for any sum that he pleases, and his executors or representatives can recover this sum in full from the insurers (*j*).

SUB-SECT. 2.—*Insurable Interest.*

The insurable interest must be generally of a pecuniary character.

1086. The interest (*k*) necessary to support an insurance must be of a pecuniary character, that is to say, the assured must stand in such a relation to the event which is the subject-matter of the insurance that he must by the happening of the event sustain or be presumed to sustain some pecuniary loss (*l*).

It has been said that a person has an insurable interest in his own life to an indefinite extent, because by insuring it he can protect his estate from that loss of his future gains or savings which might be the result of his premature death (*m*). But the better view seems to be that the case of a person insuring his own life is not within the mischief of the statute (*n*), and that the first section of that enactment, therefore, may be and ought to be construed as if the words "person or persons" were preceded by the word "other."

Insurable interest in life of husband or wife.

1087. A wife has an insurable interest in her husband's life (*o*), and a husband has an insurable interest in the life of his wife (*p*).

instance according to the probable duration of his life, and when fixed it is constant and invariable." In the case of "participating policies" the assured becomes entitled in certain events to participate in the profits of the company. The effect of such policies has been considered in *British Equitable Insurance Co., Ltd.* v. *Baily*, [1906] A. C. 35; *Baerlein* v. *Dickson* (1909), 25 T. L. R. 585. Sometimes the insurer's contract is to pay a sum at a given age in consideration either of a lump sum payment or of a periodical premium. In such case the policy is called an "endowment policy." Policies sometimes contain a provision for payment during life of a surrender value (see *Ingram-Johnson* v. *Century Insurance Co.*, [1909] S. C. 1032; *Mortgage Insurance Corporation* v. *Inland Revenue Commissioners* (1888), 21 Q. B. D. 352, C. A.). In the absence of such an agreement, companies are usually willing, after the insurance has been in force for three years, to pay a surrender value to an assured who desires to discontinue the payment of premiums. As to the valuation of policies in case of winding-up, see the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 17 (1); title COMPANIES, Vol. V., p. 637.

(*j*) *Wainewright* v. *Bland* (1835), 1 Mood. & R. 481, 487; see *M'Farlane* v. *Royal London Friendly Society* (1886), 2 T. L. R. 755, *per* POLLOCK, B., at p. 756.

(*k*) As to the legality at common law of a wager on a life and the subsequent provisions of the Life Assurance Act, 1774 (14 Geo. 3, c. 48), relating to the insurable interest, see p. 514, *ante*.

(*l*) *Halford* v. *Kymer* (1830), 10 B. & C. 724, *per* Lord TENTERDEN, C.J., at p. 728.

(*m*) Bunyon, Law of Life Assurance, 4th ed., p. 14.

(*n*) Life Assurance Act, 1774 (14 Geo. 3, c. 48); see p. 514, *ante*. See *M'Farlane* v. *Royal London Friendly Society*, *supra*, at p. 756, and *Griffiths* v. *Fleming*, [1909] 1 K. B. 805, C. A., *per* KENNEDY, L.J., at pp. 820, 821, citing *Wainewright* v. *Bland*, *supra*, at p. 488.

(*o*) This was held by Lord KENYON, C.J., in *Reed* v. *Royal Exchange Assurance Co.* (1795), Peake, Add. Cas. 70, on the ground that she is presumed to have a pecuniary interest in his life.

(*p*) The view taken by the Court of Appeal in *Griffiths* v. *Fleming*, *supra*, is that, as an insurance by a husband on the life of his wife and an

Moreover, it is provided that a married woman may effect a policy upon her own life or the life of her husband for her separate use; and a husband and wife(*q*) are enabled to make a provision for each other and for their children by means of a policy of insurance.

1088. A parent has no insurable interest in the life of his child, *quâ* child (*r*); nor has a child an insurable interest in the life of his parent, *quâ* parent (*a*).

Insurable interest of children;

1089. A person has under the Act of 1774 (*b*) an insurable interest in the life of his debtor to the amount of the debt, because, it is said, the chance of obtaining payment is presumed to be diminished by the death of the debtor (*c*). On the same principle it has been assumed that a surety has an insurable interest in the life of the principal debtor to whom he is entitled to look for an indemnity (*d*); and so one of two joint obligors has an interest in the life of the other to the extent of one-half of the debt (*e*). A trustee may have an insurable interest in respect of the legal interest in trust property vested in him; for instance, an executor who, by the

Of creditors;

Of surety;

Of trustee or executor.

insurance by the wife on the husband's life are not within the mischief of the Life Assurance Act, 1774 (14 Geo. 3, c. 48), the words "person or persons" in s. 1 (*ibid.*) do not include the husband or the wife of the assured. Indeed, this seems the only ground on which an insurance on the life of the assured's husband or wife, *quâ* husband or wife, can be held valid, inasmuch as the statute requires that in all cases to which it applies the amount or value of the interest should be capable of being estimated. The law on this subject is evidently in a very unsatisfactory condition. It is much to be desired that the Life Assurance Act, 1774 (14 Geo. 3, c. 48), should be amended by making it clear in what cases and to what extent a person can insure another's life, as has been done in the Canadian Code cited in *Anctil* v. *Manufacturers' Life Insurance Co.*, [1899] A. C. 604, 606, P. C. The American cases on insurable interest in life policies are collected in 1 May, Law of Insurance, ss. 103—109.

(*q*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11; and see title HUSBAND AND WIFE, Vol. XVI., pp. 399 *et seq.*, where this enactment is fully dealt with. As to the construction and effect of such policies, see in addition the cases there cited:—*Re Burrows' Trusts* (1864), 10 L. T. 184; *Re Lyne's Trust* (1869), L. R. 8 Eq. 65 (distinguished in *Re Griffiths' Policy*, [1903] 1 Ch. 739). The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), was applied in a case where no policy had been issued, the proposal having been accepted by parol only (*Newman* v. *Belsten* (1884), 28 Sol. Jo. 301, C. A.). Similar provisions are contained in the Married Women's Policies of Assurance (Scotland) Act, 1880 (43 & 44 Vict. c. 26), s. 2. The following cases have been decided under that Act:—*Kennedy's Trustees* v. *Sharpe* (1895), 23 R. (Ct. of Sess.) 146; *Stewart* v. *Hodge* (1901), 8 Scots Law Times, 436; *Schumann* v. *Scottish Widows' Fund Society* (1886), 13 R. (Ct. of Sess.) 678; *Scottish Life Co.* v. *Donald* (1902), 9 Scots Law Times, 158.

(*r*) *Halford* v. *Kymer* (1830), 10 B. & C. 724; *Worthington* v. *Curtis* (1875), 1 Ch. D. 419, C. A., followed in *A.-G.* v. *Murray*, [1904] 1 K. B. 165, C. A.; and compare title INFANTS AND CHILDREN, p. 162, *ante*.

(*a*) *Howard* v. *Refuge Friendly Society* (1886), 54 L. T. 644.

(*b*) Life Assurance Act, 1774 (14 Geo. 3, c. 48); see p. 514, *ante*.

(*c*) *Anderson* v. *Edie* (1795), 2 Park on Marine Insurance, 8th ed., p. 914. *Secus*, where the debt arises under an illegal contract, as for instance money won at an illegal game (*Dwyer* v. *Edie* (1788), 2 Park on Marine Insurance, 8th ed., p. 914.

(*d*) *Lea* v. *Hinton* (1854), 5 De G. M. & G. 823, C. A.

(*e*) *Branford* v. *Saunders* (1877), 25 W. R. 650.

SECT. 1. Nature of Life Insurance and Insurable Interest.

direction of his testator, insures the life of a person in the continuance of whose life the estate is interested has a sufficient insurable interest (*f*).

Mere moral obligation will not constitute an insurable interest.

1090. A mere moral obligation as distinguished from a legal obligation does not constitute an insurable interest (*g*). But where a person is under a legal obligation (for instance, by reason of a legally binding promise) to bear the expense of maintaining a child, and has undertaken that burden, then, if he has a reasonable expectation that the child when of age will repay the money so expended on his behalf, he may have, it seems, an insurable interest in the child's life to the amount of the sum expended by him, analogous to that which a creditor has in the life of his debtor (*h*).

Interest in life of employer.

A clerk in a bank or other business, who is engaged at a certain salary and for a certain period, has an insurable interest in the life of the managing partner to the extent of so much of the period as remains unexpired at the time of the effecting of the policy, but he has no insurable interest merely by reason of a promise (without consideration) having been made to him by the manager that he would not during his life enforce payment of a debt due from the clerk (*i*).

Rights of assignee of policy.

An assignee of a policy acquires the rights of an assignor and can therefore recover the amount insured, although he himself has no insurable interest (*k*).

(*f*) *Tidswell* v. *Ankerstein* (1792), Peake, 151.

(*g*) *Halford* v. *Kymer* (1830), 10 B. & C. 724; *Worthington* v. *Curtis* (1875), 1 Ch. D. 419, C. A.; *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K. B. 558, C. A.

(*h*) *Barnes* v. *London, Edinburgh and Glasgow Life Assurance Co.*, [1892] 1 Q. B. 864. This case, in which it does not appear that the promise was legally binding, is explained in *Harse* v. *Pearl Life Assurance Co.*, [1903] 2 K. B. 92, by Lord ALVERSTONE, C.J., at p. 96, and was apparently disapproved of in *Griffiths* v. *Fleming*, [1909] 1 K. B. 805, C. A., by KENNEDY, L.J., at p. 819. The Children Act, 1908 (8 Edw. 7, c. 67), s. 7, prohibits a person who for reward undertakes the nursing and maintenance of an infant under the age of seven years, apart from its parents, from insuring the life of the infant; but it is not a contravention of this statutory provision if a person who has undertaken the care of an infant and insured its life prior to the commencement of the Act (1st April, 1909) continues to pay the premiums due under the policy after such commencement (*Glasgow Parish Council* v. *Martin*, [1910] S. C. (J.) 102); and see title INFANTS AND CHILDREN, p. 162, *ante*. On the other hand, the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 62, 67, the Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 13, and the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 36, give these companies powers to grant insurance in respect of funeral expenses which would not be valid under the Life Assurance Act, 1774 (14 Geo. 3, c. 48); see p. 514, *ante*. See also titles COMPANIES, Vol. V., pp. 625, 626; FRIENDLY SOCIETIES, Vol. XV., pp. 128, 155.

(*i*) *Hebdon* v. *West* (1863), 3 B. & S. 579; *Forgan* v. *Pearl Life Assurance Co.* (1907), 51 Sol. Jo. 230.

(*k*) *Ashley* v. *Ashley* (1829), 3 Sim. 149. But a man will not be allowed to evade the Act by insuring his own life with the money, and for the benefit of another who has no interest in the life (*Wainewright* v. *Bland* (1835), 1 Mood. & R. 481; and see judgment of BAYLEY, J., in *Halford* v. *Kymer* (1830), 10 B. & C. 724). In fact, the Life Assurance Act, 1774 (14 Geo. 3, c. 48), s. 2, requiring the insertion of the name of the person interested, would be sufficient to prevent such an evasion; see p. 514, *ante*. See further, as to assignment of life polices, p. 558, *post*.

SUB-SECT. 3.—*Names of Persons Interested must be inserted in the Policy.*

SECT. 1. Nature of Life Insurance and Insurable Interest.

Names to be inserted in policy.

1091. It is necessary (*l*) to insert in the policy the name of the person primarily interested, and it is not sufficient to mention the name of the person who may be ultimately benefited (*m*).

Where a policy is effected by a trustee or executor in respect of the legal interest vested in him, it is sufficient that his name be inserted in the policy, and the name of the *cestui que trust* need not be mentioned (*n*).

SUB-SECT. 4.—*Amount Recoverable.*

Amount recoverable.

1092. The assured may not recover more than the value or amount of his insurable interest at the time of effecting the insurance (*o*), and thus there is established another difference between marine or fire insurances on goods, and life and other insurances to which the Act applies (*p*). Under an insurance on the life of the assured and, it seems also, on that of her or his husband or wife, the whole amount insured can be recovered, unless the contract be a mere cloak for a wager, in which case the policy is, of course, void and illegal (*q*). In the case of a creditor, or a case analogous to it, the amount of the debt or the sum payable by reason of the circumstances giving rise to the insurable interest is recoverable, and as the ordinary contract of life insurance is not a contract of indemnity (*r*), no deduction is to be made on account of that amount or any part of it being paid after

(*l*) See Life Assurance Act, 1774 (14 Geo. 3, c. 48); see p. 514, *ante*.

(*m*) *Evans* v. *Bignold* (1869), L. R. 4 Q. B. 622; see also *Shilling* v. *Accidental Death Insurance Co.* (1857), 2 H. & N. 42.

(*n*) *Tidswell* v. *Ankerstein* (1792), Peake, 205 [151]; compare *Collett* v. *Morrison* (1851), 9 Hare, 162. But the trustee will (subject to any lien which he may have for premiums paid by him out of his own funds), hold the money received under the policy in trust for those beneficially interested (*Re Emett, Ex parte Andrews* (1816), 1 Madd. 573; compare *Armitage* v. *Winterbottom* (1840), 1 Man. & G. 130). If A. insures the life of B., his debtor, and afterwards the debt is paid off, B. may by agreement continue to pay the premiums in order to keep the policy alive for his own benefit. "The *primâ facie* effect of an agreement between debtor and creditor, in a transaction such as the present, that the creditor shall effect a policy, and that the debtor shall pay the premiums, is to vest the equitable property in the policy, subject to the creditor's security in the debtor; the principle being, that what the debtor pays or agrees to pay for is (*primâ facie* at all events) his, subject to the security for which it was brought into existence" (*Salt* v. *Northampton* (*Marquis*), [1892] A. C. 1, *per* Lord SELBORNE, at p. 16). As to the circumstances in which a stranger to the policy who pays premiums to keep it up may acquire a lien for the amount so paid, see *Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552; *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A.; *Re Winchilsea's* (*Earl*) *Policy Trusts* (1888), 39 Ch. D. 168; *Strutt* v. *Tippett* (1890), 62 L. T. 475, C. A.; and p. 563, *post*. As to lien generally, see title LIEN.

(*o*) Life Assurance Act, 1774 (14 Geo. 3, c. 48).

(*p*) *Dalby* v. *India and London Life-Assurance Co.* (1854), 15 C. B. 365, Ex. Ch.; 2 Smith, L. C., 11th ed., 291, overruling *Godsall* v. *Boldero* (1807), 9 East, 72. As to the rule in marine insurance, see p. 367, *ante*. As to the rule in fire insurance, see p. 520, *ante*.

(*q*) *Reed* v. *Royal Exchange Assurance Co.* (1795), Peake, Add. Cas. 70; *Griffiths* v. *Fleming*, [1909] 1 K. B. 805, C. A.

(*r*) See p. 544, *ante*.

SECT. 1. Nature of Life Insurance and Insurable Interest.

the effecting of the insurance. For the same reason the principle of subrogation has no application (*s*).

Where there are several policies effected at different offices the assured can recover no more than the amount of his insurable interest at the time of making the insurance sued upon (*t*).

SUB-SECT. 5.—*Indisputable Policies.*

Amount recoverable under several policies.

Indisputable policies.

1093. Sometimes, especially in the Colonies and in the United States, a condition is indorsed on the policy that it shall be indisputable and indefeasible on any ground whatsoever. Such a stipulation will debar the insurer from resisting the claim on the ground of innocent misrepresentation or concealment, but it will not enable the assured to recover in cases where the policy is illegal and void by reason of the assured having no insurable interest, and probably not where the policy has been procured by fraud; for no stipulation between the parties can preclude the court from holding that a contract is void on grounds of public policy (*u*). An insurance company which publishes a prospectus stating that all insurances effected with it will be indisputable except in case of fraud will be precluded in an action on a policy made upon the faith of the prospectus, but without incorporating it, from disputing liability upon the ground of a merely untrue representation in the declaration upon which the policy was based, though the policy was expressly made conditional upon the truth of the declaration (*a*).

Untrue representation in declaration not incorporated in policy.

SECT. 2.—*Capacity of Persons to enter into a Contract of Life Insurance.*

General observations.

1094. The capacity of persons to enter into contracts of life insurance and other insurances is, in general, governed by the same rules of law as apply to all other contracts (*b*).

Policies by friendly societies.

1095. Insurances by infants for small sums upon their lives may be effected under the provisions of the statutes relating to friendly societies (*c*).

(*s*) *Dalby* v. *India and London Life-Assurance Co.* (1854), 15 C. B. 365, Ex. Ch.; *Branford* v. *Saunders* (1877), 20 W. R. 650; *Gaggin* v. *Upton* (1859), Drury *temp.* Nap. 427; compare *Bradburn* v. *Great Western Rail. Co.* (1874), L. R. 10 Exch. 1. As to subrogation, see pp. 490, 518, *ante.*

(*t*) *Hebdon* v. *West* (1863), 3 B. & S. 579.

(*u*) *Anctil* v. *Manufacturers' Life Insurance Co.*, [1899] A. C. 604, P. C.

(*a*) *Wood* v. *Dwarris* (1856), 11 Exch. 493; compare *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232, Ex. Ch.; *Anstey* v. *British Natural Premium Life Association, Ltd.* (1908), 24 T. L. R. 594, 871, C. A. As to misrepresentation generally, see title MISREPRESENTATION AND FRAUD.

(*b*) See title CONTRACT, Vol. VII., p. 341.

(*c*) See title FRIENDLY SOCIETIES, Vol. XV., pp. 128, 147. As to the capacity and incapacity of infants, see title INFANTS AND CHILDREN, pp. 46 *et seq.*, *ante.* As to the capacity of married women to contract, see title HUSBAND AND WIFE, Vol. XVI., pp. 376 *et seq.* As to policies by married women for the benefit of themselves, their husbands and children, see p. 545, *ante;* and title HUSBAND AND WIFE, Vol., XVI., p. 399.

SECT. 3.—*Agency.*

SECT. 3. Agency.

Authority of agent.

1096. The general principles of the law of agency apply to life insurances, and it is therefore sufficient to notice a few points more immediately connected with these contracts (*d*).

An ordinary local agent of a life insurance company is not, without special authority, empowered to bind the company by a contract to grant a policy. His duty is to forward the proposal to the company for acceptance or refusal, and he has no authority to insure on behalf of the company (*e*). On the other hand, if he is authorised to accept proposals, the company is bound by his act in so doing (*f*), but the agent cannot in general bind the company by altering the conditions of any contract of insurance or by reviving a lapsed policy without the previous approval of the directors (*g*).

A fortiori if a person, known by the assured to be an agent for effecting policies subject to certain specific provisions, acts in violation of them, he does not bind the company (*h*).

Estoppel.

Knowledge of the agent may be imputed to the principal.

1097. The insurance company may, however, be estopped from availing itself of a condition in a policy by receiving premiums after the breach of the condition is known to its agent, if it is his duty to communicate the fact to the office, for then his knowledge may be properly imputed to the latter. Thus, if the assured without special authority from the office goes to reside in a foreign country under circumstances which would ordinarily make the policy void, and the company's agent with knowledge of these circumstances receives the premiums subsequently and transmits them to the office, the policy will continue to be binding on the company (*i*).

The "life" is not agent for the person effecting the insurance.

1098. Where the life of one person is insured by another, at whose request the former answers questions put to him on behalf of the office, he is not the agent of the assured, even for that limited purpose; and the assured is not, except so far as he warrants their truth, affected by the inaccuracy of the answers, even if fraudulent,

(*d*) See title AGENCY, Vol. I., p. 147; and p. 354, *ante*.

(*e*) *Linford* v. *Provincial Horse and Cattle Insurance Co.* (1864), 34 Beav. 291.

(*f*) *Rossiter* v. *Trafalgar Life Assurance Association* (1859), 27 Beav. 377 (where the proposal was accepted by a sub-agent); *Mackie* v. *European Assurance Society* (1869), 21 L. T. 102; and see *Horncastle* v. *Equitable Life Assurance Society of the United States* (1906), 22 T. L. R. 735, C. A.; *Comerford* v. *Britannic Assurance Co.* (1908), 24 T. L. R. 593.

(*g*) *British Industry Life-Assurance Co.* v. *Ward* (1856), 17 C. B. 644; *Acey* v. *Fernie* (1840), 7 M. & W. 151; *Busteed* v. *West of England Fire and Life Insurance Co.* (1857), 5 I. Ch. R. 553.

(*h*) *Montreal Assurance Co.* v. *McGillivray* (1859), 13 Moo. P. C. C. 87 (fire insurance).

(*i*) *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265, C. A.; *Splents* v. *Lefevre* (1863), 11 L. T. 114. The same principle is illustrated by cases on accident insurance policies; see *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, C. A., and compare with it *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K. B. 516; *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521 (employers' liability policy). For further illustration of imputation of knowledge and consequent estoppel, see pp. 359, 407, 530, *ante*; and title ESTOPPEL, Vol. XIII., pp. 386, 388.

SECT. 3. Agency.

unless he is a party to the fraud (*j*): *a fortiori* the person whose life is insured is not the general agent of the assured to effect the insurances, and the latter is not prejudiced by his non-disclosure of material facts as to which no question is asked (*k*).

Ratification.

1099. The doctrine in marine insurance that the contract of insurance may be ratified after knowledge of the loss does not apply to life insurance, nor, indeed, to any other contract of insurance (*l*).

SECT. 4.—*Representation, Concealment and Warranties.*

SUB-SECT. 1.—*Contract Uberrimæ Fidei; Representation and Concealment.*

Life insurance a contract *uberrimæ fidei.*

1100. Life insurance, like marine (*m*) and fire insurance (*n*), is a contract *uberrimæ fidei*, and the general principles of law as to misrepresentation and concealment which govern marine insurance apply also to life insurance, except so far as they may be excluded or modified by the terms and conditions of the policy (*o*). The policy is therefore avoided not only by fraud, but also by the concealment or misrepresentation of a material fact, whether or not it caused or was in any way connected with the death of the assured, and further, the question whether the matter concealed or misrepresented is material is a question of fact, namely, whether the matter represented or concealed was such as would influence the mind of a reasonable and prudent insurer in accepting or declining the risk (*p*).

SUB-SECT. 2.—*Warranties: the Declaration.*

Warranties and the declaration.

1101. The general principles of law relating to "warranties" which apply to marine insurance are equally applicable to life insurance (*q*).

According to ordinary practice of life insurance the assured is required to make and sign a statement, or declaration as it is

(*j*) *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232, Ex. Ch., explaining *Everett* v. *Desborough* (1829), 5 Bing. 503; *Huckman* v. *Fernie* (1838), 3 M. & W. 505; see p. 533, *ante*.

(*k*) *Huckman* v. *Fernie*, *supra*.

(*l*) See *Grover and Grover, Ltd.* v. *Mathews*, [1910] 2 K. B. 401. For the treatment of the doctrine of ratification in marine insurance, see p. 360, *ante*.

(*m*) See p. 404, *ante*.

(*n*) See p. 532, *ante*.

(*o*) *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, *per* Lord BLACKBURN, at p. 954; *Lindenau* v. *Desborough* (1828), 8 B. & C. 586; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363; and see *Wainwright* v. *Bland* (1836), 1 M. & W. 32; *British Equitable Insurance Co.* v. *Musgrave* (1887), 3 T. L. R. 630.

(*p*) See pp. 404 *et seq.*, *ante*. As materiality is a question of fact, it is of little use to cite all the cases in which juries have been allowed or directed to find that the fact concealed or misrepresented was material to be known to the insurers. It may, however, be useful to refer to *Morrison* v. *Muspratt* (1827), 4 Bing. 60; *British Equitable Insurance Co.* v. *Musgrave*, *supra* (previous illnesses); *London Assurance* v. *Mansel*, *supra*; *Wainwright* v. *Bland*, *supra* (risk declined by other officer); see *Huguenin* v. *Rayley* (1815), 6 Taunt. 186 (assured in prison at date of proposal). A misstatement that other insurers had effected a policy on the risk is material (*Sibbald* v. *Hill* (1814), 2 Dow, 263, H. L.), so is a misrepresentation on a reinsurance that the reinsured office intended to retain part of the risk (*Trail* v. *Baring* (1864), 4 Giff. 485).

(*q*) See p. 416, and p. 534, *ante*; *Thomson* v. *Weems* (1884), 9 App. Cas. 671.

usually called, giving certain specified information, or answering certain specified questions concerning the life insured and other matters more or less affecting or connected with the risk (*r*). It is generally expressly stipulated in the policy, or in the conditions indorsed thereon, that the declaration is true and is to be taken as the basis of the contract (*s*).

The effect of such a stipulation is that the assured is held to warrant the truth of the declaration, and if it states anything untrue, whether to the knowledge of the assured or not, and whether material or not, the contract is avoided (*t*). Thus, if the declaration

(*r*) See Bunyon, Law of Life Insurance, 4th ed., pp. 45, 46, for a list of matters, some of which are usually referred to in the declaration. If a person takes out a policy and warrants that he will not commit suicide, this is not merely an undertaking for the breach of which damages can be recovered, but a condition, so that if the assured commits suicide the policy is avoided (*Ellinger & Co.* v. *Mutual Life Insurance Co. of New York*, [1905] 1 K. B. 31, C. A.; compare and distinguish *Benham* v. *United Guarantie and Life Assurance Co.* (1852), 7 Exch. 744 (fidelity policy)).

(*s*) In the absence of such a stipulation the answers will be representations, as to the general effect of which see pp. 412 *et seq.*, *ante*. See, for example, *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232, Ex. Ch.; and see p. 550, *ante*. The following is a usual form of life policy:—

Whereas of (herein called the Assured), desiring to effect an Assurance on h own life for the whole duration thereof with the Assurance Company (herein called the Company) in the sum of Pounds has delivered to the Company, as the basis of the said Assurance, a Statement of Particulars and Declaration bearing date the day of 19 .

Now, in consideration of the payment by the Assured of the sum of as a Premium for such Assurance until the day of 19 inclusive.

This Policy witnesseth, that if the Assured shall die on or before the last mentioned day, or in case the Assured shall, on or before the day of 19 , and on or before the day of in every year thereafter until h death, pay to the Company the premium of then the funds and other property of the Company shall be subject and liable to pay the sum of Pounds to the Executors, Administrators, or Assigns of the Assured within eight days after proof (satisfactory to the Directors of the Company) of the death of the Assured, and of the title of the person claiming payment shall have been given to and deposited with the Company.

Provided always, that the funds and property of the Company remaining unapplied and undisposed of, and inapplicable to prior claims and demands in pursuance of the Company's Deed of Settlement at the time of the making of any claim or demand upon this Policy, shall alone be answerable in respect thereof; and that the Directors signing this Policy, shall not, nor shall the other Members of the Company, or any of them or anyone who shall become a Member of the Company, be personally liable in respect of any such claim or demand, further or otherwise than according to the provisions of the Company's Deed of Settlement as Members of the Company to contribute to the funds of the Company the amounts remaining unpaid of their respective Shares in the Capital Stock of the Company.

Provided also, that this Policy is made upon, and is subject to the Conditions printed on the back which are to be taken as part of the Policy.

In witness whereof etc.

(*t*) *Anderson* v. *Fitzgerald* (1853), 4 H. L. Cas. 484; *Cazenove* v. *British Equitable Assurance Co.* (1859), 6 C. B. (N. S.) 437; *Macdonald* v. *Law Union Insurance Co.* (1874), L. R. 9 Q. B. 328; *Thomson* v. *Weems* (1884), 9 App. Cas. 671; *Hambrough* v. *Mutual Life Insurance Co. of New York* (1895), 72 L. T. 140, C. A.; *Joel* v. *Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863, C. A., *per* FLETCHER MOULTON, L.J., at pp. 885, 886. But the declaration must have been made by, or by authority of, the assured (*Pearl Life Assurance Co* v. *Johnson*, *Same* v. *Greenhalgh*, [1909] 2 K. B. 288).

SECT. 4. Representation, Concealment and Warranties.

which is made the basis of the insurance contains a statement that the life assured has not been attacked by a certain illness, and the statement is untrue, the policy is avoided, however slight the illness may have been, at any rate unless it was of such a nature that he could not be reasonably aware of it, and the declaration cannot be fairly considered as including latent and unknown disease (*u*).

Construction of the warranty.

1102. Although a warranty must be strictly complied with, nevertheless such a construction will be given to it as will give effect to the meaning which the parties must be presumed to have intended (*v*), and if a person states in the declaration merely that he believes or is informed that a certain fact is true, or that he is not aware of any circumstance tending to shorten his life, the warranty only extends to the state of his belief, information, or knowledge, and not to the facts of which he is *bonâ fide* unaware (*w*).

Declaration and policy must be read together.

1103. The declaration and the policy must be read together. A declaration may, as has been seen (*a*), be so framed as expressly to define and limit the rights of the insurer as to the communication and materiality of facts, and to exclude any effect upon the contract

(*u*) *Thomson* v. *Weems* (1884), 9 App. Cas. 671, *per* Lord WATSON, at pp. 687 *et seq.*, disapproving *dicta* in *Scottish Equitable Life Assurance Society* v. *Buist* (1877), 4 R. (Ct. of Sess.) 1076; *Hutchison* v. *National Loan Fund Life Assurance Society* (1845), 7 Dunl. (Ct. of Sess.) 467; see also *Geach* v. *Ingall* (1845), 14 M. & W. 95; *Chattock* v. *Shawe* (1835), 1 Mood. & R. 498; *Shilling* v. *Accidental Death Insurance Co.* (1858), 1 F. & F. 116. The same principle applies to all insurances. For instance, a tradesman insured his vehicles, and signed a proposal form declaring that the particulars given by him to the company were true, and agreed that the proposal and declaration should be the basis of his contract. In the particulars he stated that he had only three small claims made against him for damage during the previous year, whereas in fact there had been at least ten: it was held that the company were not liable (*Reid & Co.* v. *Employers' Accident and Live Stock Insurance Co.* (1899), 1 F. (Ct. of Sess.) 1031).

(*v*) *Perrins* v. *Marine and General Travellers' Insurance Society* (1859), 2 E. & E. 317, 324, Ex. Ch.; *Grogan* v. *London and Manchester Industrial Assurance Co.* (1885), 53 L. T. 761. As to the meaning of a statement in the declaration that the assured was temperate in his habits and had always been so, see *Thomson* v. *Weems*, *supra*. If in such a case he was not temperate, the policy is avoided although the death of the assured was not in any way connected with his intemperance (*ibid.*). As to the meaning of a warranty that the assured is in good health at the time of the making of the policy, see the summing up of Lord MANSFIELD, C.J., in *Ross* v. *Bradshaw* (1761), 1 Wm. Bl. 312; and in *Willis* v. *Poole* (1780), 2 Park on Marine Insurance, 8th ed., p. 935; and see *Thomson* v. *Weems*, *supra*, at p. 692. As to the meaning of a warranty that the assured is not afflicted with a disorder tending to shorten the duration of life, see *Watson* v. *Mainwaring* (1813), 4 Taunt. 763; *Jones* v. *Provincial Insurance Co.* (1857), 3 C. B. (N. S.) 65; *Swete* v. *Fairlie* (1833), 6 C. & P. 1. As to the meaning of the question, "who is your usual medical attendant," see *Huckman* v. *Fernie* (1838), 3 M. & W. 505; *Everett* v. *Desborough* (1829), 5 Bing. 503, 516. As to the meaning of the warranty that the assured had not had any spitting of blood or other affection of the lungs and that he was not subject to fits, see *Geach* v. *Ingall* (1845), 14 M. & W. 95; *Chattock* v. *Shawe* (1835), 1 Mood. & R. 498; *Shilling* v. *Accidental Death Insurance Co.* (1858), 1 F. & F. 116.

(*w*) *Stackpole* v. *Simon* (1779), 2 Park on Marine Insurance, 8th ed., p. 932; *Jones* v. *Provincial Insurance Co.*, *supra*; *Thomson* v. *Weems*, *supra*, at p. 690.

(*a*) See p. 534, *ante*, and note (*s*), p. 551, *ante*.

from an innocent misrepresentation or non-disclosure of a matter not specified in the declaration (*b*), and where the policy provides only against intentional misstatement, an innocent misrepresentation in the declaration, though the latter is made the basis of the policy, will not avoid it (*c*).

Declaration is deemed to be continued up to the time of the completion of contract.

1104. The declaration agreed upon as the basis of the contract is taken as continuing up to the time of the completion of the contract, and any intermediate change of circumstances rendering it untrue must be communicated. Thus if the declaration purports to give the name of the latest medical attendant of the assured, and before the completion of the contract he consults another medical attendant, and conceals that fact, the declaration becomes untrue, and this may have the effect of avoiding the insurance (*d*).

Similarly, where the declaration states that the insured is in good health, and before the insurance is completed by the payment of the premium, he sustains injury by accident, the insurance company may refuse to accept the premium or issue a policy (*e*).

Medical examination.

1105. It is usual for the person whose life is to be insured to appear before the medical adviser of the insurance office to be examined as to his state of health. In such case, if the statement he makes to the latter is declared to be the basis of the policy, the assured, though his is not the life to be insured, thereby warrants its truth. But if the statement is not made the basis of the policy, then it amounts merely to a representation and not to a warranty, and will not avoid the policy, even if fraudulently made, unless the assured is a party to the fraud (*f*).

Medical referee.

Sometimes the assured refers the office to a medical attendant named by himself. As the latter is not the agent of the assured for effecting the insurance, any fraud, misrepresentation, or concealment by such medical man, if made without the connivance or

(*b*) *Jones* v. *Provincial Insurance Co.* (1857), 3 C. B. (N. S.) 65.

(*c*) *Fowkes* v. *Manchester and London Life Assurance and Loan Association*, (1863), 3 B. & S. 917; *Hemmings* v. *Sceptre Life Association, Ltd.*, [1905] 1 Ch. 365; *Joel* v. *Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863, C. A. (where assured when making declaration was ignorant that she had been insane). A prospectus advertising that the company's policies will be indisputable in case of fraud may have the same effect (*Wood* v. *Dwarris* (1856), 11 Exch. 493; *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232, Ex. Ch.); see p. 552, *ante*. Compare and distinguish *Reis* v. *Scottish Equitable Life Assurance Society* (1857), 2 H. & N. 19 (where an allegation that the policy did not embody the real agreement between the parties was not allowed to be pleaded by way of replication by one who had chosen to sue on the policy).

(*d*) *British Equitable Insurance Co.* v. *Great Western Rail. Co.* (1869), 38 L. J. (CH.) 314, C. A. (in this case the new medical attendant diagnosed, as the result proved, correctly, a serious disease; but the former medical attendant did not agree, it was said, in this opinion). See also *Trail* v. *Baring* (1864), 4 Giff. 485.

(*e*) *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727, C. A.; compare *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469 (contract of suretyship), and see p. 533, *ante*.

(*f*) *Wheelton* v. *Hardisty*, *supra*; see the judgments in *Joel* v. *Law Union and Crown Insurance Co.*, *supra*; and see p. 549, *ante*.

SECT. 4. Representation, Concealment, and Warranties.

knowledge of the assured, will not avoid the policy (*g*), though, of course, if the assured, before the effecting of the policy, has knowledge of any such fraud, concealment, or misrepresentation, the insurance, being a contract *uberrimæ fidei*, is voidable (*h*).

Where a person insures the life of another, reference is usually made to a medical man acquainted with the life assured, and the former is required to make a statement, or to answer certain questions relating to the health of the life assured, or other matters considered material to the risk insured.

Here again, if any such declarations or statements are made the basis of the policy, they constitute warranties. If, however, they are not so made the basis of the insurance, they are not warranties, and the policy is binding provided the assured does not, before the policy is effected, become aware of any misrepresentation or concealment by those persons whom he has put forward to give the required information (*i*).

SECT. 5.—*Commencement and Duration of Risk; Avoidance of the Policy; Conditions in the Policy.*

SUB-SECT. 1.—*Commencement and Duration of Risk.*

Commencement and duration of risk.

1106. In the absence of provision to the contrary the risk commences at the time when a binding contract of insurance is concluded (*k*).

The policy often contains a condition that the insurance shall not commence until the premium is paid; but if the policy recites that the premium has been paid, the company may be taken to have waived the right to insist that prepayment of the premium was a condition precedent to the commencement of the risk (*l*).

(*g*) *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232, Ex. Ch.; *Blackburn, Low & Co.* v. *Vigors* (1887), 12 App. Cas. 531, *per* Lord HALSBURY, L.C., at p. 538.

(*h*) See *Trail* v. *Baring* (1864), 4 Giff. 485; *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727, C. A.

(*i*) *Wheelton* v. *Hardisty supra*. This case, which is very complicated on account of the pleadings, decided only one important point, namely, that neither the "life" nor his referee is, generally speaking, the agent of the assured to make representations. The *dicta* to a contrary effect in earlier cases, such as *Morrison* v. *Muspratt* (1827), 4 Bing. 60; *Maynard* v. *Rhodes* (1824), 5 Dow. & Ry. (K. B.) 266; and *Everett* v. *Desborough* (1829), 5 Bing. 503, are there explained or overruled. As to this, see Lord CAMPBELL'S judgment in *Wheelton* v. *Hardisty*, *supra*, at pp. 270, 272. See also on this subject the elaborate judgments in *Joel* v. *Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863, C. A.

(*k*) *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727, C. A. It seems that the risk may commence before a policy is issued upon a parol contract to insure (*Newman* v. *Belsten* (1884), 28 Sol. Jo. 301, C. A.). If, however, the proposal be for the insurance of the life of a third person, and he be dead at the time without the knowledge of the assured or assurers, there is, in the absence of some express terms to the contrary, no valid contract, insurance being in its essence a contract for payment upon the future death of a person in being (*Pritchard* v. *Merchant's and Tradesman's Mutual Life-Assurance Society* (1858), 3 C. B. (N. S.) 622, *per* WILLES, J., at p. 643 (a case of attempted renewal of a lapsed policy after death)).

(*l*) *Roberts* v. *Security Co.*, [1897] 1 Q. B. 111, C. A. (where it was not clearly decided that the company was estopped from denying the payment). The correctness of this decision was doubted in *Equitable Fire and Accident Office, Ltd.* v.

SECT. 5. Commencement and Duration of Risk etc.

As regards the duration of the risk, if the policy be expressed to be in force until a certain day the risk continues up to the end of that day (*m*). A policy for a specified period "from" a given date excludes the date fixed for the commencement of the computation. Thus, an insurance for twelve calendar months from the 24th November, 1887, excludes that date and includes the 24th November, 1888 (*n*).

SUB-SECT. 2.—*Conditions in the Policy.*

Conditions as to payment of the premium and as to the revival of the policy.

1107. A policy of life insurance generally contains a number of conditions, a breach of which will render it void.

There is generally a condition relating to the payment of the premiums on or before the day on which it falls due or within a prescribed number of days afterwards (usually thirty days, which are called days of grace). Such conditions are in various forms, and their construction is sometimes a matter of doubt and difficulty, on which no general rules can usefully be laid down (*o*).

There is also sometimes a condition for the revival of the policy within a limited term after an omission to pay the premium upon proof being given of good health (*p*).

Condition as to death on the high seas etc.

1108. A life policy usually contains a condition that the insurance shall be void if the assured or the life assured shall die upon the high seas, unless licence be obtained from the directors, or if the assured shall go beyond the limits of Europe, or if the assured shall enter military or naval service without previous licence from the directors (*q*).

The Ching Wo Hong, [1907] A. C. 96, P. C., on the ground that in equity the acknowledgment of the receipt of the purchase-money has no binding effect, and that it is provided by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11), that where the rules of law and equity differ the rules of equity should prevail. It may, perhaps, be doubted whether these reasons are satisfactory. In some cases there is an obligation to pay the premium upon the issue of the policy; see *General Accident Insurance Corporation* v. *Cronk* (1901), 17 T. L. R. 233; and title ESTOPPEL, Vol. XIII., p. 366.

(*m*) *Isaacs* v. *Royal Insurance Co.* (1870), L. R. 5 Exch. 296. As to the effect of provisions for the continuance of the risk during days of grace, see p. 526, *ante*, and cases cited in notes (*o*), (*p*), *infra*.

(*n*) *South Stafford Tramways Co.* v. *Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402, C. A.

(*o*) See *Want* v. *Blunt* (1810), 12 East, 183; *Tarleton* v. *Staniforth* (1794), 5 Term Rep. 695; affirmed (1796), 1 Bos. & P. 471, Ex. Ch.; *British Industry Life-Assurance Co.* v. *Ward* (1856), 17 C. B. 644; *Phœnix Life Assurance Co.* v. *Sheridan* (1860), 8 H. L. Cas. 745; *Stuart* v. *Freeman*, [1903] 1 K. B. 47, C. A.; *Simpson* v. *Accidental Death Insurance Co.* (1857), 2 C. B. (N. S.) 257; *Pritchard* v. *Merchant's and Tradesman's Mutual Life-Assurance Society* (1858), 3 C. B. (N. S.) 622; *Prince of Wales Life Assurance Co.* v. *Harding* (1857), E. B. & E. 183. As to a condition requiring "satisfactory proof" of interest "to be furnished to the directors," see *Cowell* v. *Yorkshire Provident Life Assurance Co.* (1901), 17 T. L. R. 452.

(*p*) As to the construction and effect of such conditions, the forms of which vary very much, see *Pritchard* v. *Merchant's and Tradesman's Mutual Life-Assurance Society*, *supra*, and especially the judgment of WILLIAMS, J.; see also *Stuart* v. *Freeman*, [1903] 1 K. B. 47, C. A.; *Handler* v. *Mutual Reserve Fund Life Association* (1904), 90 L. T. 192, C. A.; *Stokell* v. *Heywood*, [1897] 1 Ch. 459 (accident policy).

(*q*) Bunyon, Law of Life Insurance, 4th ed., pp. 99—102; but as these conditions vary a great deal in form it seems useless to enlarge on the cases in

SECT. 5. Commencement and Duration of Risk etc.

Death by suicide, if felonious, excepted by common law.

1109. On grounds of public policy, apart from any express provisions in the policy, the representatives of an assured cannot recover, in the case of his death by felonious suicide (*r*), for the same reason that a life policy is not allowed to cover death at the hands of justice (*s*). But this doctrine applies only to felonious suicide, and not to suicide by a person when insane (*t*). Moreover, at any rate in the absence of some provision to the contrary, the assignee of the policy stands in case of felony in no better position than the representatives of the assured (*a*).

Express conditions as to suicide.

1110. But a life policy almost always contains an express condition providing that the policy is to be void in case of suicide. Under a policy containing such a provision, the insurers are free from liability, if the assured intentionally commits suicide, even, it seems, if he was so insane as not to be able to distinguish between right and wrong (*b*). The condition against suicide generally provides that the policy shall be void in the case of suicide, unless and so far as a third party has *bonâ fide* acquired an interest therein by assignment, lien etc. The effect of this condition is that the assignee can recover (*c*), although neither the executor nor the trustee in bankruptcy of the assured can do so (*d*). Thus where the policy has been deposited to secure a current

which particular forms were construed. The following are cases on these points:—*Beacon Life and Fire Assurance Co.* v. *Gibb* (1862), 1 Moo. P. C. C. (N. S.) 73; *Notman* v. *Anchor Assurance Co.* (1858), 4 C. B. (N. S.) 476 (1st); *Vyse* v. *Wakefield* (1840), 6 M. & W. 442.

(*r*) *Horn* v. *Anglo-Australian and Universal Family Life Assurance Co.* (1861), 30 L. J. (CH.) 511, *per* WOOD, V.-C.

(*s*) *Amicable Society* v. *Bolland* (1830), 4 Bli. (N. S.) 194, H. L.; *Horn* v. *Anglo-Australian and Universal Family Life Assurance Co.*, *supra*.

(*t*) *Horn* v. *Anglo-Australian and Universal Family Life Assurance Co.*, *supra*.

(*a*) *Amicable Society* v. *Bolland*, *supra*. Express conditions against suicide usually contain a provisio for the protection of assignees; see the text, *infra*. Where the evidence is equally balanced as between accident and suicide, the presumption against crime justifies a finding in favour of accident (*Harvey* v. *Ocean Accident and Guarantee Corporation*, [1905] 2 I. R. 1, 26, C. A.).

(*b*) *Clift* v. *Schwabe* (1846), 3 C. B. 437, Ex Ch. (where, under a policy expressed to be void if the assured "should commit suicide," it was held, POLLOCK, C.B., and WIGHTMAN, J., dissenting, that the representatives of the assured could not recover where the latter had died by taking sulphuric acid with the intention of destroying himself, though at the time of committing the act he was not capable of judging between right and wrong); *Borradaile* v. *Hunter* (1843), 5 Man. & G. 639 (policy void if "the assured should die by his own hands"); *Dufaur* v. *Professional Life Assurance Co.* (1858), 25 Beav. 599, at p. 602. See also *Ellinger & Co.* v. *Mutual Life Insurance Co. of New York*, [1905] 1 K. B. 31, C. A. (where the applicant effected a policy on his own life expressed to be for the benefit of the plaintiffs, his creditors).

(*c*) *Dufaur* v. *Professional Life Assurance Co.*, *supra* (a policy may be "legally assigned" though only subject to an equitable charge); *Jones* v. *Consolidated Investment Assurance Co.* (1858), 26 Beav. 256; *White* v. *British Empire Mutual Life Assurance Co.* (1868), L. R. 7 Eq. 394; *Moore* v. *Woolsey* (1854), 4 E. & B. 243; *Wigan* v. *English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291 (where the requirement of "valuable consideration" for the assignment was not satisfied).

(*d*) *Jackson* v. *Forster* (1860), 1 E. & E. 463, 470, Ex. Ch.

balance, the assignee can recover (*e*), and even when equitably assigned to the insuring company, the policy will be in force to the extent of the company's interest (*f*). But where a policy is assigned together with other securities to secure a debt, and the assured commits suicide, the insurers, on payment of the policy moneys, cannot claim an assignment of the other securities, nor to have the debt thrown primarily upon them, or apportioned rateably between them and the policy moneys (*g*).

Execution for felony.

1111. When the insured is executed for felony, his death, as already stated (*h*), is not covered by the policy, and the insurance money is not payable. But where a husband effects a policy on his life for his wife's benefit and he is subsequently murdered by her, although public policy prevents the wife receiving a benefit from her felony, there is a resulting trust for the estate of the deceased, and his executors can recover the insurance moneys (*i*).

Arbitration clause.

1112. A life policy usually contains an arbitration clause, and the same construction and effect will be given to it as in a fire policy (*j*).

SECT. 6.—*Cancellation of Policy and Return of Premium.*

Return of premium and cancellation of policy.

1113. The law as to the right of the assured to claim a return of the premium in case of the policy being or becoming void is the same in life insurance as in marine insurance (*k*).

Where policy is voidable.

When a policy is voidable by reason of fraudulent misrepresentation the insurers are entitled to maintain an action to have it cancelled, without, it seems, offering to return the premiums (*l*).

Where there is an express stipulation that if any untrue averment be contained in the declaration (*m*), or if the facts required to be set forth in the proposal be not thereby stated, all moneys paid on account of the assurance shall be forfeited and the assurance itself be void, then if there has been any incorrect statement which avoids the policy the premiums cannot be recovered (*n*); but in the absence of such express stipulation for the forfeiture of the premiums on avoidance of the policy, it seems that in order to obtain cancellation the insurer must, at least in the absence of fraud, be ready to return the premiums (*o*).

(*e*) *Jones* v. *Consolidated Investment Assurance Co.* (1858), 26 Beav. 256.
(*f*) *White* v. *British Mutual Life Assurance Co.* (1868), L. R. 7 Eq. 394.
(*g*) *Solicitors' and General Life Assurance Society* v. *Lamb* (1864), 2 De G. J. & Sm. 251, C. A.
(*h*) *Amicable Society* v. *Bolland* (1830), 4 Bli. (N. S.) 194, H. L.; see p. 556, *ante*.
(*i*) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147, C. A.
(*j*) See p. 540, *ante*; and title ARBITRATION, Vol. I., pp. 437 *et seq.*
(*k*) See p. 496, *ante*.
(*l*) *Fenn* v. *Craig* (1838), 3 Y. & C. (EX.) 216, 219, *per* ALDERSON, B.; 1 Park on Marine Insurance, 8th ed., p. 456; see also *Barker* v. *Walters* (1844), 8 Beav. 92, 96 (where the question whether an offer to return the premiums was necessary was not determined).
(*m*) As to the declaration, see p. 550, *ante*.
(*n*) *Duckett* v. *Williams* (1834), 2 Cr. & M. 348.
(*o*) *Barker* v. *Walters* (1844), 8 Beav. 96; *British Equitable Insurance Co.* v.

SECT. 6. Cancellation of Policy and Return of Premium.

Where policy is void though not illegal.

1114. Where a policy which is not illegal is void *ab initio* and no risk is run, the assured is entitled to the return of the premium he has paid, but if the risk has once commenced the premium cannot, in the absence of fraud, be reclaimed. Thus in the case of an insurance on a life with a common exception of suicide, if the party commits suicide within twenty-four hours after the completion of the policy, the insurers are not bound to return the premium (*p*).

On the other hand, if the assured is entitled to have the policy cancelled on the ground of his having been induced to enter into the contract of insurance by the fraud of the insurers, he is entitled to recover the premiums he has paid (*q*).

Where policy is illegal.

1115. If the policy is illegal, for instance, on the ground of the assured having no insurable interest, he cannot recover the premiums he has paid unless there has been fraud on the part of the company or their agent (*r*).

SECT. 7.—*Assignment of Life Policies.*

SUB-SECT. 1.—*Apart from Statute Law.*

A life policy is a legal chose in action not assignable at common law, but assignable in equity.

1116. A policy of life insurance, or, to speak more accurately, the benefit of or right of action on a policy of life insurance, is a chose in action which was not assignable at common law (*s*). But from the earliest times a chose in action was assignable in equity (*t*).

A life policy is a legal chose in action, inasmuch as the claim under it can be enforced in an action at law (*u*). Therefore, apart from certain statutes hereafter mentioned (*a*), the assignor, or, if he is dead, his legal personal representative, must be a party to the action, either as plaintiff or defendant. And the assignee is entitled to bring the action in the name of the assignor on giving him a

Musgrave (1887), 3 T. L. R. 630. Where a person who was a necessary defendant was innocent of the fraud, and claimed no interest under the policy, the premiums were applied in payment of the costs of all parties, the balance being paid into court with liberty to apply.

(*p*) *Bermon* v. *Woodbridge* (1781), 2 Doug. (K. B.) 781, 789.

(*q*) *Refuge Assurance Co., Ltd.* v. *Kettlewell*, [1909] A. C. 243; *Mutual Reserve Life Insurance Co.* v. *Foster* (1904), 20 T. L. R. 715, H. L.; followed in *Cross* v. *Mutual Reserve Life Insurance Co.* (1904), 21 T. L. R. 15; *Merino* v. *Mutual Reserve Life Insurance Co.* (1904), 21 T. L. R. 167; *Molloy* v. *Mutual Reserve Life Insurance Co.* (1905), 22 T. L. R. 59.

(*r*) *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K. B. 558, C. A.; *British Workman's and General Assurance Co.* v. *Cunliffe* (1902), 18 T. L. R. 502, C. A.

(*s*) *Dufaur* v. *Professional Life Assurance Co.* (1858), 25 Beav. 599, 603. The property in the policy may be passed by delivery, so as to disentitle the original owner to sue for its detention (*Rummens* v. *Hare* (1876), 1 Ex. D. 169, C. A.; see title GIFTS, Vol. XV., p. 411).

(*t*) See title CHOSES IN ACTION, Vol. IV., pp. 365, note (*n*), 374; and the judgments in *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, C. A.; see also *British Cash and Parcel Conveyors, Ltd.* v. *Lamson Store Service Co., Ltd.*, [1908] 1 K. B. 1006, C. A., *per* MOULTON, L.J., at p. 1013. As to the transfer by the insurance company of its business and liabilities, see the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 13; titles COMPANIES, Vol. V., p. 634; CONTRACT, Vol. VII., p. 508.

(*u*) *Re Moore, Ex parte Ibbetson* (1878), 8 Ch. D. 519, C. A.; see title CHOSES IN ACTION, Vol. IV., p. 362.

(*a*) See pp. 560 *et seq.*, *post*.

proper indemnity against all costs and charges consequent on the use of his name; or, on proving his refusal to allow the use of his name, the assignee may make him a defendant (*b*).

Mode of assignment.

1117. The mode or form of the assignment is immaterial provided it is clear that the assignee is to have the benefit of the policy (*c*).

Effect of the notice of assignment and the consequences of not giving notice.

1118. Notice to the insurance company is not necessary as between the assignor and the assignee. But such notice is necessary in order to make the assignee's title effective as against the company. If notice is given, no assent or acquiescence on the part of the company is required (*d*). The notice need not be in any particular form, and may be verbal (*e*). If no such notice is given, the assignee will have to credit the company with any payment made to the assignor in ignorance of the assignment (*f*); and he may be deprived of the benefit of the assignment by a surrender of the policy to the company (*f*).

So also, if no notice be given to the company, the assignee will be postponed to a subsequent assignment of which notice has been given, provided that the subsequent assignee does not know of the prior assignment at the time he takes his security. Moreover, if the subsequent assignee does not know of the prior assignment when he takes his security, knowledge at the time when he gives notice is immaterial (*g*).

On the other hand, if the subsequent assignee at the time of the assignment to him has notice, whether actual or constructive, of a prior assignment, he cannot by giving notice to the company defeat the title of the prior assignee (*h*).

To whom notice must be given.

In order that notice to the company of an assignment may be effectual, it must be given to the proper officers authorised to receive the notice and when engaged in the business of the company (*i*).

(*b*) See title CHOSES IN ACTION, Vol. IV., p. 391.

(*c*) *Ibid.*, p. 375, and cases there cited; see especially the judgment of Lord MACNAGHTEN in *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454. In *Howes* v. *Prudential Assurance Co.* (1883), 49 L. T. 133, LOPES, J., seems to have ruled that an assignment must be in writing, *sed quære*. A simple deposit of a policy with a creditor as security for a debt is not an assignment of the policy, but merely gives a lien (*Crossley* v. *City of Glasgow Life Assurance Co.* (1876), 4 Ch. D. 421; *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169, C. A.; *Spencer* v. *Clarke* (1878), 9 Ch. D. 137). As to lien generally, see title LIEN.

(*d*) See title CHOSES IN ACTION, Vol. IV., p. 379.

(*e*) *Ibid.*, p. 381.

(*f*) *Ibid.*, p. 380; *Fortescue* v. *Barnett* (1834), 3 My. & K. 36; *Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11, C. A.

(*g*) See title CHOSES IN ACTION, Vol. IV., p. 380, and the cases there cited.

(*h*) *Hiern* v. *Mill* (1806), 13 Ves. 114; *Spencer* v. *Clarke*, *supra*.

(*i*) See title CHOSES IN ACTION, Vol. IV., p. 385, and the cases there cited. Where the first assignee of a policy gives notice to the office, then, although he does not obtain possession of the policy, he takes precedence of a subsequent purchaser who obtains possession without notice of the prior assignment (*Meux* v. *Bell* (1841), 1 Hare, 73). Compare *Spencer* v. *Clarke*, *supra*, followed in *Re Weniger's Policy*, [1910] 2 Ch. 291 (priorities between second mortgagee who had given notice, and first mortgagee making further advances without notice of the second mortgage). The first assignee is not relieved of the

SECT. 7. Assignment of Life Policies.

Thus, the fact that the solicitor who negotiates the mortgage of a policy is a local agent of the insurance company is not sufficient to affect the office with notice of the charge unless he has express authority to receive notice on its behalf (*k*).

Assignee only acquires the rights of the assignor.

1119. The equitable assignees of a policy cannot give a valid discharge to the insurance company unless expressly empowered to do so (*l*).

The insurance company has against the assignee of the policy the same equities and defences as it would have against the assignor at the date at which notice of the assignment is given to it (*m*).

As to the law governing the assignment of a policy in a foreign country.

1120. The validity of the transfer of an English policy, if made in another country, is governed by the law of that country. Therefore the transfer, if invalid according to the law of the country where it is executed, will be treated as invalid here, although it would have been good according to English law (*n*).

Assignment carries bonuses.

1121. The assignment or bequest of a policy carries with it any bonuses or additions which may accrue to the sum assured and which are not expressly excluded from its operation (*o*).

SUB-SECT. 2.—*Under the Judicature Act*, 1873, *s.* 25 (6).

The Judicature Act, 1873, s. 25 (6).

1122. Under the Judicature Act, 1873 (*p*), s. 25 (6), the assignee of a policy may acquire the legal right to the same and all the remedies therefor, with power to give a good discharge. But certain conditions, which are stated elsewhere (*q*), must be complied with.

necessity of giving notice, even though he is unaware of the assignment (*Re Lake, Ex parte Cavendish*, [1903] 1 K. B. 151).

(*k*) See title CHOSES IN ACTION, Vol. IV., p. 385; and especially *Gale* v. *Lewis* (1846), 9 Q. B. 730.

(*l*) *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765, 774, C. A.; and see *Jones* v. *Farrell* (1857), 1 De G. & J. 208, at p. 218.

(*m*) See title CHOSES IN ACTION, Vol. IV., p. 386. If by reason of any breach of warranty, wrongful concealment, or false statement, the policy is invalid as regards the original assured, it will be equally so as against the assignee (*Scottish Equitable Life Assurance Society* v. *Buist* (1877), 4 R. (Ct. of Sess.) 1076; *Thomson* v. *Weems* (1884), 9 App. Cas. 671).

(*n*) *Lee* v. *Abdy* (1886), 17 Q. B. D. 309; see titles CHOSES IN ACTION, Vol. IV., p. 366; CONFLICT OF LAWS, Vol. VI., p. 245.

(*o*) *Courtney* v. *Ferrers* (1827), 1 Sim. 137; *Parkes* v. *Bott* (1838), 9 Sim. 388; *Roberts* v. *Edwards* (1863), 9 Jur. (N. S.) 1219 (bequest). As to the construction of a covenant by the assignor of a policy not to do any act vitiating a policy, and of similar covenants, see *Vyse* v. *Wakefield* (1840), 6 M. & W. 442; *Dormay* v. *Borrodaile* (1847), 10 Beav. 335. As to the title to a policy or its proceeds on the life of a debtor, taken to secure payment of a debt which has been paid off, see p. 562, *post*. An absolute covenant to effect an insurance for the benefit of another is not released by the life afterwards becoming uninsurable (*Re Arthur, Arthur* v. *Wynne* (1880), 14 Ch. D. 603). If a man on his marriage covenants to settle any property of which he may thereafter become possessed by devise, bequest or purchase, and subsequently effects policies on his own life, those policies are deemed to be property acquired by purchase, to which the trustees are entitled by virtue of the covenant (*Re Turcan* (1888), 40 Ch. D. 5, C. A.).

(*p*) 36 & 37 Vict. c. 66. See title CHOSES IN ACTION, Vol. IV., p. 367, note (*h*).

(*q*) See title CHOSES IN ACTION, Vol. IV., p. 367. As to the time from which

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1123. The application, however, of this provision in the Judicature Act, 1873 (*r*), to life policies is practically superseded by the Policies of Assurance Act, 1867 (*s*).

SUB-SECT. 3.—*Under the Policies of Assurance Act*, 1867.

Policies of Assurance Act, 1867.

1124. The Policies of Assurance Act, 1867 (*s*) (hereafter called "the Act of 1867"), is entitled an Act to enable assignees of policies of life assurance to sue thereon in their own names. It enacts that any person becoming entitled by assignment or other derivative title to a policy of life assurance, and possessing at the time of action brought the right in equity to receive, and the right to give an effectual discharge to the assurance company liable under such policy for, moneys thereby assured or secured, shall be at liberty to sue at law in his own name to recover such moneys (*t*). Whether the plaintiff has in any particular case the right in equity to receive and the right to give an effectual discharge to the insurance company must be determined upon the principles above referred to (*u*)

It is further provided that in any action on a policy of life insurance a defence or reply on equitable grounds may be relied on (*v*).

No assignment, made after the 20th August, 1867, of a policy of life assurance confers on the assignee any right to sue for the amount of such policy, until a written notice of the date and purport of such assignment has been given to the assurance company liable under such policy at its principal place of business for the time being, or at one of its principal places of business, either in England, Scotland, or Ireland; and the date on which such notice is received regulates the priority of all claims under any assignment. A payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice has been received is as valid against the assignee giving such notice as if the Act of 1867 (*w*) had not been passed (*x*).

Object of the Act.

The object and effect of the Act of 1867 (*w*) is to provide a simple remedy against an insurance company, and also to give facilities to offices in settling claims, by enabling them to recognise as the first claim the claim of the person who first gave such notice as the statute requires (*y*); but the Act of 1867 (*w*) does not enable a person

the assignment takes effect, see title CHOSES IN ACTION, Vol. IV., p. 367. As to the equities to which it is subject, see *ibid.*, pp. 367, 373. As to the relief obtainable by payment into court, see p. 565, *post*. For a form of requisitions on title to policies of insurance, see Withers, Life and Reversionary Interests in Personalty Trust Funds, and Policies of Life Assurance, p. 227, and for notes as to matters to be attended to on or before completion of the assignment, see *ibid.*, pp. 187 *et seq.*

(*r*) 36 & 37 Vict. c. 66, s. 25 (6); see p. 560, *ante*.

(*s*) 30 & 31 Vict. c. 144.

(*t*) *Ibid.*, s. 1. See title CHOSES IN ACTION, Vol. IV., p. 395.

(*u*) See p. 558, *ante*.

(*v*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 2, which came into force on 20th August, 1867.

(*w*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144).

(*x*) *Ibid.*, s. 3.

(*y*) As to the protection of the insurance company in case of adverse claims, see p. 565, *post*.

SECT. 7. **Assignment of Life Policies.**

how has advanced money upon a second assignment with notice of a prior charge to exclude the prior assignee by giving the statutory notice to the office (*a*).

Specification of principal place of business.

Further, every insurance company is required to specify in the policy their principal place or places of business at which the notices of assignment may be given (*b*); and upon request in writing and payment of a fee not exceeding 5*s*. to acknowledge receipt of any such notice; the acknowledgment, if signed by the proper officer, being conclusive evidence against the company that it has received the notice (*c*).

Form of assignment.

The assignment may be made either by indorsement on the policy or by a separate instrument to the effect that the assignor in consideration etc. assigns unto the assignee the policy of insurance (*d*).

SUB-SECT. 4.—*Effect of Bankruptcy.*

Effect of bankruptcy.

1125. On bankruptcy, life policies belonging to the debtor, like other choses in action, vest in the trustee in bankruptcy. But one who for value takes from the bankrupt an assignment after the bankruptcy, but without notice of it, may, by giving notice to the company, obtain a priority over a trustee who has given none (*e*).

SECT. 8.—*Title to the Policy and the Insurance Moneys; Liens.*

SUB-SECT. 1.—*Policy effected on the Life of Another.*

The life insured may by agreement express or implied acquire an interest in a life policy.

1126. Where an insurance has been effected by one party on the life of another, the latter has, apart from any contract express or implied, no interest in the policy (*f*). But he may acquire an interest or property in the policy by a contract either express or implied from the acts of the parties. For instance, the *primâ facie* effect of an agreement between debtor and creditor that the creditor shall effect a policy and the debtor shall pay the premiums, is to vest the equitable property in the policy, subject to the creditor's security, in the debtor; the principle being that what the debtor pays or agrees to pay for is (*primâ facie* at all events) his, subject

(*a*) *Newman* v. *Newman* (1885), 28 Ch. D. 674, *per* NORTH, J., at p. 681. See also *Bradley* v. *James* (1876), 10 I. R. C. L. 441.

(*b*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 4.

(*c*) *Ibid.*, s. 6.

(*d*) *Ibid.*, s. 5, and Schedule; ss. 7 and 8 (*ibid.*) define the meaning of the expression "policy of life assurance" as used in the Act.

(*e*) *Re Russell's Policy Trusts* (1872), L. R. 15 Eq. 26; not following *Re Webb's Policy* (1867), 15 W. R. 529; and see *Stuart* v. *Cockerell* (1869), L. R. 8 Eq. 607; *Palmer* v. *Locke* (1881), 18 Ch. D. 381, C. A. As to the effect of the reputed ownership clause, see *Ryall* v. *Rowles* (1750), 1 Ves. Sen. 348; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 144, 173.

(*f*) *Bruce* v. *Garden* (1869), 5 Ch. App. 32; *Freme* v. *Brade* (1858), 2 De G. & J. 582, C. A.; *Brown* v. *Freeman* (1851), 4 De G. & Sm. 444; *Knox* v. *Turner* (1870), 5 Ch. App. 515; *Preston* v. *Neele* (1879), 12 Ch. D. 760; *Lewis* v. *King* (1875), 44 L. J. (CH.) 259, C. A.; and see *Forde* v. *Tynte* (1872), 41 L. J. (CH.) 758 (where the question arose between successive incumbrancers); and see cases cited in note (*h*), p. 563, *post*.

to the security for the purpose of which it was brought into existence (*g*).

This *primâ facie* presumption is, however, capable of being rebutted by a contrary inference to be drawn from the conduct of the parties or the documents which passed between them (*h*).

Payment to person who has no insurable interest.

1127. It sometimes happens that the insurance office pays the insurance money to a person who has no insurable interest in the life insured. In such case, the question who is entitled to the money must be determined as if the Act of 1774 (*i*) did not exist, inasmuch as the statute makes the contract only void as between the company and the insurer (*k*).

SUB-SECT. 2.—*Liens on the Policy, and the Moneys secured thereby.*

Lien.

1128. The following rules have been laid down as determining the question whether a lien or charge upon money secured by a policy may be created by payment of premiums.

Such lien or charge may arise (1) by contract with a beneficial owner of the policy; (2) by reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; (3) by subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property; (4) by reason of the right of mortgagees or others having a charge on the policy to add to their charge any moneys paid by them to preserve the property (*l*).

Equitable deposit.

Equitable lien created by deposit of the policy.

1129. The mere deposit of a title deed (and this includes a policy) upon an advance of money gives an equitable lien, and the deposit will cover subsequent advances, upon evidence that they were made upon that security (*m*).

(*g*) *Salt* v. *Northampton* (*Marquis*), [1892] A. C. 1, *per* Lord SELBORNE, at p. 16; *Holland* v. *Smith* (1806), 6 Esp. 11; *Drysdale* v. *Piggott* (1856), 8 De G. M. & G. 546, C. A.; *Morland* v. *Isaac* (1855), 20 Beav. 389; and see title EQUITY, Vol. XIII., pp. 91, 92. As to the distinction between a policy taken to secure a debt and a policy to secure an annuity, see *Drysdale* v. *Piggott*, *supra*; *Knox* v. *Turner* (1870), 5 Ch. App. 515; *Preston* v. *Neele* (1879), 12 Ch. D. 760.

(*h*) *Triston* v. *Hardey* (1851), 14 Beav. 232; *Lea* v. *Hinton* (1854), 19 Beav. 324, 326; *Henson* v. *Blackwell* (1845), 4 Hare, 434; compare with which, however, *Holland* v. *Smith*, *supra*.

(*i*) Life Assurance Act, 1774 (14 Geo. 3, c. 48); see p. 514, *ante*.

(*k*) *Worthington* v. *Curtis* (1875), 1 Ch. D. 419, C. A.; *A.-G.* v. *Murray*, [1904] 1 K. B. 165, C. A.; *Hadden* v. *Bryden* (1899), 1 F. (Ct. of Sess.) 710; *Freme* v. *Brade* (1858), 2 De G. & J. 582, C. A.; see *Re a Policy No.* 6402 *of the Scottish Equitable Life Assurance Society*, [1902] 1 Ch. 282. See on this subject, titles EQUITY, Vol. XIII., pp. 154 *et seq.*; TRUSTS AND TRUSTEES.

(*l*) *Re Leslie*, *Leslie* v. *French* (1883), 23 Ch. D. 552, *per* FRY, J., who held that except in these four cases no lien or charge is created by payment of premiums. This case was followed in the Court of Appeal in *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A., where all the previous decisions were reviewed, and where it was held that the payment of premiums by the owner of the equity of redemption of a policy gave him no right as against the mortgagees of the policy unless it could be shown that the payment was made with their concurrence, or at their request. See also the judgment of NORTH, J., in *Re Winchilsea's* (*Earl*) *Policy Trusts* (1888), 39 Ch. D. 168; and that of LINDLEY, L.J., in *Strutt* v. *Tippett* (1890), 62 L. T. 475, C. A., at p. 477; *Re Power's Policies*, [1899] 1 I. R. 6, C. A.

(*m*) *Ex parte Langston* (1810), 17 Ves. 227, 230; *Norris* v. *Wilkinson* (1806),

SECT. 8. Title to the Policy and the Insurance Moneys; Liens.

Sometimes insurance companies, when making advances of money, grant a life policy to the borrower which they detain for the purposes of security for the repayment of money advanced. If in such a case there is a breach of condition, as by non-payment of premiums, rendering the policy void, the company is entitled to insist that it has become so, and to enforce its other remedies for the debt (*n*).

Loans by insurance companies secured by policies.

SECT. 9.—*Payment of Claims.*

Proof of death.

1130. There is no such thing in life insurance law as a constructive total loss. Thus, in the case of an insurance on a man's life for a year, if shortly before the expiration of the term he received a mortal wound, of which he died after the year, the insurer would not be liable (*o*). To recover under the policy the plaintiff must prove the death of the life assured. The policy generally contains a condition that the death must be proved by evidence satisfactory to the directors, but this means such evidence as they may reasonably, not such as they may unreasonably and capriciously, require (*p*).

Presumption as to death.

1131. In cases where a person goes abroad or disappears from view, and is not subsequently heard of for seven years, there the law presumes that he is dead, but there is no presumption that death occurred at the beginning or the end or at any particular period during those seven years (*q*). But evidence of particular facts, for instance that the life assured was on board a vessel which encountered a very severe storm and was never heard of afterwards, is proper to be considered as going to establish the fact that he died at that particular time (*a*).

12 Ves. 192, 198; *Ex parte Whitbread* (1812), 19 Ves. 209; *Ex parte Hooper* (1815), 19 Ves. 477; *Ex parte Kensington* (1813), 2 Ves. & B. 79; *Vanderzee* v. *Willis* (1789), 3 Bro. C. C. 21. The cases relate to title deeds, but the principle is equally applicable to policies. For further particulars as to the subject of liens, see, generally, titles LIEN; MORTGAGE.

(*n*) *Edge* v. *Duke* (1849), 18 L. J. (CH.) 183. As to loan transactions of the above character, see *Grey* v. *Ellison* (1856), 1 Giff. 438; *Brown* v. *Price* (1858), 4 Jur. (N. S.) 882; *Fitzwilliam* (*Earl*) v. *Price* (1858), 4 Jur. (N. S.) 889.

(*o*) *Lockyer* v. *Offley* (1786), 1 Term Rep. 252, 260; compare *Simpson* v. *Accidental Death Insurance Co.* (1857), 2 C. B. (N. S.) 257.

(*p*) *Braunstein* v. *Accidental Death Insurance Co.* (1861), 1 B. & S. 782; *Ballantine* v. *Employers Insurance Co. of Great Britain* (1893), 31 Sc. L. R. 230; *Trew* v. *Railway Passengers' Assurance Co.* (1861), 6 H. & N. 839, Ex. Ch.; *Harvey* v. *Ocean Accident and Guarantee Corporation*, [1905] 2 I. R. 1, 26, 30, 37, C. A. (which see as to the presumption against suicide).

(*q*) See title EVIDENCE, Vol. XIII., p. 500; *Nepean* v. *Doe* d. *Knight* (1837), 2 M. & W. 894, at p. 912, Ex. Ch.; *Re Creed* (1852), 1 Drew. 235; *In the Goods of Smyth* (1858), 28 L. J. (P. & M.) 1; *In the Goods of How* (1858), 1 Sw. & Tr. 53; *Re Tindall's Trust* (1861), 30 Beav. 151 (as to which see title EVIDENCE, Vol. XIII., p. 500, note (*r*)); *Re Phené's Trusts* (1870), 5 Ch. App. 139; *Doe* d. *France* v. *Andrews* (1850), 15 Q. B. 756; see also *Prudential Assurance Co.* v. *Edmonds* (1877), 2 App. Cas. 487; *Lambe* v. *Orton* (1859), 29 L. J. (CH.) 286; *Hickman* v. *Upsall* (1875), L. R. 20 Eq. 136.

(*a*) *Patterson* v. *Black* (1780), 2 Park on Marine Insurance, 8th ed., p. 920; *In the Goods of Main* (1858), 1 Sw. & Tr. 11; compare *Hickman* v. *Upsall*, *supra*; *Lambe* v. *Orton*, *supra*.

Discharge by one of two creditors.

1132. When a debt is due to one or more joint creditors, it is, in the absence of fraud, competent to any of them to give a valid discharge to the debtor, which may be done after action brought; and this principle will be applicable when insurers are indebted to joint grantees of a policy (*b*).

Delivery of the policy.

1133. The insurance office is entitled to the delivery of the policy on payment of the claim. If the policy is lost an action may nevertheless be brought upon it, it being usual for the plaintiff to offer to give a proper indemnity; but the court will not insist upon this, its judgment being a sufficient indemnity to the defendants (*c*).

Conflicting claims.

1134. When there has been an assignment of the policy, even if it has not been made under the provisions of the Judicature Act, 1873 (*d*), or of the Policies of Assurance Act, 1867 (*e*), the insurers are entitled to be secured from any possible claim from the assignor (*f*).

Where there are adverse claims to the moneys due under the policy and the insurance company is, or expects to be, sued by two or more parties in respect of them, and the respective claimants each require payment of the sum assured, relief may be obtained by the company by interpleader proceedings (*g*).

When the insurance company can be considered as being in the position of trustees, they can in the case of conflicting claims pay the money into court under the Trustee Relief Acts (*h*); but when they cannot be considered in that position the Acts do not apply, and the company formerly had, in these circumstances, to interplead if they were in doubt as to the right of one among adverse claimants

(*b*) *Wallace* v. *Kelsall* (1840), 7 M. & W. 264, 272; *Gordon* v. *Ellis* (1844), 2 Dow. & L. 308, 316, 317.

(*c*) *England* v. *Tredegar* (*Lord*) (1866), L. R. 1 Eq. 344; *Crokatt* v. *Ford* (1856), 25 L. J. (CH.) 552; compare *Bushnan* v. *Morgan* (1833), 5 Sim. 635. In such a case the money may now be paid into court under the Life Assurance Companies (Payment into Court) Act, 1896 (59 & 60 Vict. c. 8) (*Harrison* v. *Alliance Assurance Co.*, [1903] 1 K. B. 184, C. A.); see p. 566, *post*. Interest on the sum due under the policy may be awarded as damages; see p. 504, *ante*. It seems that the rate allowable at the present time will in general be 4 per cent.; see *Re Metropolitan Coal Consumers' Association, Ltd., Ex parte Wainwright* (1889), 59 L. J. (CH.) 281; *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 1 Ch. 120, C. A., *per* KEKEWICH, J., at p. 130; reversed, but without dealing with the rate of interest, [1893] A. C. 429; *Re Hunt, Harvey's Claim*, [1902] 2 Ch. 318, n. As to interrogatories in an action on a life policy, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 102.

(*d*) 36 & 37 Vict. c. 66; see p. 560, *ante*.

(*e*) 30 & 31 Vict. c. 144; see p. 561, *ante*.

(*f*) R. S. C., Ord. 57, r. 1 (a); see also Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); *Prudential Assurance Co.* v. *Thomas* (1867), 3 Ch. App. 74, 76; compare *Ottley* v. *Gray* (1847), 16 L. J. (CH.) 512; and title EQUITY, Vol. XIII., p. 57. It is prudent for the company to ascertain, before applying for relief, that there really is a dispute; see *Matthew* v. *Northern Assurance Co.* (1878), 9 Ch. D. 80, *per* JESSEL, M.R., at p. 88.

(*g*) *Prudential Assurance Co.* v. *Thomas*, *supra*; see also *Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546, 551, C. A., and title INTERPLEADER, p. 587, *post*.

(*h*) See title CHOSES IN ACTION, Vol. IV., p. 374; *Re Hall* (1861), 5 L. T. 395; *United Kingdom Life Assurance Co.* (1865), 34 Beav. 493; *Re Webb's Policy* (1866), L. R. 2 Eq. 456.

SECT. 9. Payment of Claims.

to receive the insurance money (*i*). But now by statute (*k*) every insurance company, not being a society registered under the Acts relating to friendly societies, can pay into court any moneys payable by them under a life policy in respect of which no sufficient discharge can otherwise, in the opinion of the board of directors, be obtained (*k*).

Part V.—Accident Insurance: Insurance against Liability for Accidents to Third Persons.

SECT. 1.—*Accident Insurance.*

Accident insurances and the declaration usually required.

1135. Most life insurance companies make it part of their business to issue accident policies, that is to say, insurances against death or injuries occasioned by accident; and numerous companies have been incorporated for the express purpose. In such policies the insurance company usually undertakes to pay a certain sum to the executors of the assured in case of his death by accident, and a certain smaller sum in case of disablement, total or partial, and to pay a weekly allowance for a given period while he is incapacitated from following his usual occupation. An accident insurance of this description, being a contract to pay a specified sum upon the occurrence of a certain event, is not, it seems, a contract of indemnity (*l*); from which it follows that, in cases where the assured has a remedy against a third party who caused the accident, the doctrine of subrogation (*m*) does not apply.

In making the proposal for insurance a declaration is generally required from the assured in which, as in the case of a life policy, he gives certain particulars and information to enable the insurance company to estimate the insured risk (*n*).

The rules as to the nature and effect of such a declaration and as to the effect of misrepresentation are the same as in the case of a

(*i*) *Re Haycock's Policy* (1876), 1 Ch. D. 611, 616; *Matthew* v. *Northern Assurance Co.* (1878), 9 Ch. D. 80.

(*k*) Life Assurance Companies (Payment into Court) Act, 1896 (59 Vict. c. 8), s. 3; R. S. C., Ord. 54c, r. 3; *Harrison* v. *Alliance Assurance Co.*, [1903] 1 K. B. 184, C. A.; *Re Weniger's Policy*, [1910] W. N. 278 (company cannot by means of an indemnity indirectly obtain its costs out of the fund in court in violation of R. S. C., Ord. 54c, r. 2); and see title COMPANIES, Vol. V., p. 620.

(*l*) See *Theobald* v. *Railway Passengers Assurance Co.* (1854), 10 Exch. 45, *per* ALDERSON, B., at p. 53. Nor does the existence of the insurance affect the amount recoverable from the third party (*Bradburn* v. *Great Western Rail. Co.*, (1874), L. R. 10 Exch. 1; see title CARRIERS, Vol. IV., p. 59).

(*m*) See pp. 490, 518, *ante*.

(*n*) As to the usual form and contents of the declaration, see Bunyon, Law of Life Assurance, 4th ed., p. 145.

life policy (*o*); and, generally speaking, the course of business pursued and the legal principles applicable to insurances against accidents are the same as those already described in the case of life insurance (*p*). It will be found that the cases decided on accident policies turn mainly on the meaning of particular words or clauses in those instruments rather than on the application of any general rules of construction.

Construction of accident policies.

1136. Accident policies give rise mainly to two questions—first, has an accident occurred within the meaning of the policy, and, secondly, did the death or injury arise from such accident? As regards the latter question, in the absence of words showing a contrary intention, the maxim *causa proxima non remota spectatur* is applicable, a maxim which is not peculiar to this branch of insurance law, and which has been fully discussed elsewhere (*q*). Thus, in a policy against "death by accident, but excluding injury arising from natural disease," if the assured is drowned owing to his being attacked by an epileptic fit, the insurers are liable, because the proximate cause of death is drowning, and drowning is held to be an accident within the meaning of the policy (*r*).

But the maxim in question may be expressly or impliedly excluded by the words of the policy.

Death or injury arising from the accident.

Thus, where the insurance is against death "from the effects of injury caused by accident," and the assured dies from pneumonia brought on in consequence of an accident, the insurers are liable if it appears that the pneumonia was the natural and reasonable consequence of the injury (*s*). On the other hand, where the insurance is against accident, with an exception of "death arising from . . . hernia, erysipelas . . . arising within the system of the assured before, or at the time of, or following" the injury ("whether causing such death directly or jointly with an accidental injury"), if death takes place from erysipelas arising some days after an accident, the insurers are not liable (*t*). Again, under a policy against death, "the sole and immediate cause" of which should be "bodily injury caused by violent, accidental, external, and visible means," if death occurs owing to the assured

(*o*) See p. 550, *ante*; *Levy* v. *Scottish Employers' Insurance Co.* (1901), 17 T. L. R. 229; *Re Marshall and Scottish Employers' Liability and General Insurance Co.* (1901), 85 L. T. 757.

(*p*) See pp. 543 *et seq.*, *ante*.

(*q*) See pp. 437, 530 *et seq.*, *ante*.

(*r*) *Winspear* v. *Accident Insurance Co.* (1880), 6 Q. B. D. 42, C. A.; *Lawrence* v. *Accidental Insurance Co.* (1881), 7 Q. B. D. 216; compare *Reynolds* v. *Accidental Insurance Co.* (1870), 22 L. T. 820; and see cases cited in note (*d*), p. 568, *post*.

(*s*) *Isitt* v. *Railway Passengers Assurance Co.* (1889), 22 Q. B. D. 504. A policy contained a proviso exempting the company from liability in case of death "by poison or intentional self-injury," amongst other causes. The assured by mistake took poison instead of a dose of medicine. It was held that, although the death was perfectly accidental, the insurance company were not liable (*Cole* v. *Accident Insurance Co.* (1889), 61 L. T. 227).

(*t*) *Smith* v. *Accident Insurance Co.* (1870), L. R. 5 Exch. 302, distinguishing *Fitton* v. *Accidental Death Insurance Co.* (1864), 17 C. B. (N. S.) 122 (where the hernia which proved fatal was directly caused by the accident).

SECT. 1. Accident Insurance.

straining his heart (which was, without his knowledge, in a weak and unhealthy condition) in pushing a drunken man off the premises, the sum insured will not be recoverable (*u*). On the other hand, in a policy "against bodily injury caused by violent, accidental, external, and visible means," an injury caused by the assured wrenching his knee, in which there was no antecedent weakness, in stooping down to pick up a marble is covered by a policy in similar terms (*v*).

Meaning of the word "accident."

1137. As regards the former question, namely, what constitutes an accident, it does not seem possible to give a completely accurate and exhaustive definition; but, speaking generally, the expression "accident" denotes an unlooked-for mishap or an untoward event which is not expected or designed (*w*).

Some violence, casualty, or *vis major* is necessarily involved (*a*).

Thus, in the case of an insurance against death or injury by accident, the policy will apply only in cases where something fortuitous is the direct and substantial cause of death or injury (*b*). And death is not the less directly caused by the accident, although there are intermediate stages in the patient's condition (*e.g.*, erysipelas, septicæmia, or pneumonia), which are passed through before death ensues upon the accident (*c*). Death by drowning is an accident within the terms of a policy against "accident," though subject to a proviso that no claim shall be made for any injury unless "caused by some outward and visible means" (*d*); and death occasioned by a fall in stepping out of a stationary railway

(*u*) *Re Scarr and General Accident Assurance Corporation*, [1905] 1 K. B. 387.

(*v*) *Hamlyn* v. *Crown Accidental Insurance Co.*, [1893] 1 Q. B. 750, C. A.; compare *Martin* v. *Travellers' Insurance Co.* (1859), 1 F. & F. 505.

(*w*) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A. C. 443 (overruling *Hensey* v. *White*, *Lloyd* v. *Sugg & Co.*, *Walker* v. *Lilleshall Coal Co.*, [1900] 1 Q. B. 481, C. A., and *Roper* v. *Greenwood & Sons* (1900), 83 L. T. 471, C. A.); *Boardman* v. *Scott and Whitworth*, [1902] 1 K. B. 43, C. A.; *Ismay, Imrie & Co.* v. *Williamson*, [1908] A. C. 437. It is to be observed that although the above authorities and other cases on the construction of the Workmen's Compensation Acts (for which see title MASTER AND SERVANT) throw useful light on the meaning of the word "accident," considerable caution must be used in applying them to the construction of accident policies, because the doctrine that the proximate cause of the loss can alone be regarded is not applicable in all its strictness to cases of workmen's compensation. On this point see *Fenton* v. *Thorley & Co., Ltd.*, *supra*, *per* Lord LINDLEY, at p. 454.

(*a*) *Sinclair* v. *Maritime Passengers' Insurance Co.* (1861), 3 E. & E. 478, 485.

(*b*) *Martin* v. *Travellers' Insurance Co.*, *supra*; *Hamlyn* v. *Crown Accidental Insurance Co.*, *supra*; *Hooper* v. *Accidental Death Insurance Co.* (1860), 5 H. & N. 546, 557, Ex. Ch.

(*c*) *Mardorf* v. *Accident Insurance Co.*, [1903] 1 K. B. 584 (septicæmia supervening upon scratch by thumbnail), and *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591, C. A. (pneumonia supervening upon fall out hunting); these are strong cases, because the policies expressly excluded death from any "intervening" cause. Compare *Cole* v. *Accident Insurance Co.* (1889), 61 L. T. 227; and cases cited in note (*s*), p. 567, *ante*, and note (*u*), *supra*.

(*d*) *Trew* v. *Railway Passengers' Assurance Co.* (1861), 6 H. & N. 839, Ex. Ch.; *Reynolds* v. *Accidental Insurance Co.* (1870), 22 L. T. 820; *Winspear* v. *Accident Insurance Co.* (1880), 6 Q. B. D. 42, C. A.; *Harvey* v. *Ocean Accident and Guarantee Corporation*, [1905] 2 I. R. 1, 26, C. A.

carriage is covered by a policy against death by "railway accident" (*e*). But death by sunstroke is not death by accident (*f*).

On the other hand, in the case of a policy against accident sustained by a railway servant "in discharge of duty in the company's service," incapacity caused by nervous shock arising from alarm at an apparently imminent railway accident which it was the duty of the assured to assist in preventing, and which he in fact prevented, is caused by accident within the policy (*g*). The injury must not, however, be due to a purely voluntary act, because in such case it cannot be regarded as accidental (*h*).

Construction of conditions

1138. In order to arrive at the meaning and effect of the conditions of the policy the whole document must be studied, and the object of the parties steadily borne in mind (*i*). Where the meaning of the conditions cannot be arrived at by any other means, they should be construed strictly against the insurers who issue the policy and for whose benefit they are introduced (*k*). Moreover, it seems that under a policy against accidental death, death from suicide excepted, if the body of the assured is found drowned it will be presumed, in the absence of any evidence as to how the deceased became immersed in the water, to be a case of accidental death within the policy, because there is a presumption of law against the assured having caused his own death by what would be *primâ facie* a criminal act (*l*).

Insurances against railway accidents are often effected by means of a ticket taken by the passenger at the time he takes his railway ticket (*m*).

(*e*) *Theobald* v. *Railway Passengers Assurance Co.* (1854), 10 Exch. 45 (policy against death by "railway accident").

(*f*) *Sinclair* v. *Maritime Passengers' Insurance Co.* (1861), 3 E. & E. 478.

(*g*) *Pugh* v. *London, Brighton and South Coast Rail. Co.*, [1896] 2 Q. B. 248, C. A.

(*h*) *Re Scarr and General Accident Assurance Corporation*, [1905] 1 K. B. 387 (voluntary effort injuring a weak heart). A policy sometimes contains a condition against "wilful or negligent exposure to unnecessary danger." See *Walker* v. *Railway Passengers Assurance Co.* (1910), 129 L. T. Jo. 64, C. A. As to the presumption in favour of accident as against suicide, see *Harvey* v. *Ocean Accident and Guarantee Corporation*, [1905] 2 I. R. 1, C. A.

(*i*) As to a statement in the declaration that the assured is not "insured or proposing to insure" with any other office, see *Re Marshall and Scottish Employers' Liability and General Insurance Co.* (1901), 85 L. T. 757 (where the truth of the statement was held to be a condition precedent to liability).

(*k*) *Cornish* v. *Accident Insurance Co.* (1889), 23 Q. B. D. 453, C. A., *per* LINDLEY, L.J., at p. 456; and see *Mardorf* v. *Accident Insurance Co.*, [1903] 1 K. B. 584; *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591, C. A.

(*l*) *Harvey* v. *Ocean Accident and Guarantee Corporation, supra*, which see as to the effect of a condition casting upon the claimant the onus of giving "proof satisfactory to the directors of the cause of death"; and see pp. 539, 564, *ante*.

(*m*) As to insurances effected by such tickets by the Railway Passengers Assurance Co., see Railway Passengers Assurance Co.'s Act, 1864 (27 & 28 Vict. c. cxxv.). As to insurance by coupon in a diary and the burthen of proof as to registration according to the condition in the coupon, see *General Accident, Fire and Life Assurance Corporation* v. *Robertson*, [1909] A. C. 404. Newspapers and periodical publications sometimes offer free insurances to persons killed or injured who may have a copy of the paper in their possession at the

SECT. 1. Accident Insurance.

Knowledge of the agent may be imputed to the insurance office.

1139. In actions on policies of insurance against accident, just as in life insurances, the knowledge of the agent of the office may, in certain cases, be imputed to the office, and then the consequences will be the same as if the office were cognisant of the fact known to the agent (*n*), and his conduct, therefore, may operate against them by way of estoppel (*o*).

Condition as to notice to be given.

1140. Accident policies generally contain a condition requiring notice of the accident to be given to the insurance company within a prescribed period; and the question arises whether a strict compliance with this requirement is a condition precedent to the liability of the company. This is a question depending upon the terms of the various conditions of the policy, and no general rule of construction can be laid down (*p*).

SECT. 2.—*Insurance against Liability for Accidents to Third Persons; Employers' Liability Insurance.*

Employers' liability insurance.

1141. Since the passing of the Employers' Liability Act, 1880 (*q*), and the Workmen's Compensation Act, 1897 (*r*), the practice of

time. See Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 20, as to the stamp duties payable in respect of such insurances. See further as to stamp duty, p. 516, *ante*.

(*n*) In the somewhat curious case of *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, C. A., a one-eyed man who had effected an insurance subsequently lost the sight of his remaining eye by reason of an accident. His infirmity was known to the defendant's agent when the insurance was effected, but he had not informed the company of it. The plaintiff's proposal, filled up by the agent, stated that he had "no physical infirmity." The court held that he had sustained complete and irrecoverable loss of the sight of both eyes within the meaning of the policy, and was therefore entitled to recover for a total disablement. With this case compare *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K. B. 516; *Life and Health Assurance Association* v. *Yule* (1904), 6 F. (Ct. of Sess.) 437; *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521 (employers' liability policy). The proposal usually contains a statement by the assured that there are no circumstances rendering him peculiarly liable to accidents, as to which see *Cruikshank* v. *Northern Accident Insurance Co.* (1895), 33 Sc. L. R. 134; which see also as to the meaning of the words "paralysis" and "no physical infirmity" in the proposal.

(*o*) *M'Millan* v. *Accident Insurance Co.*, [1907] S. C. 484. As to the operation of such estoppel, see pp. 407, 530, 549, *ante*; and title ESTOPPEL, Vol. XIII., pp. 386 *et seq.*

(*p*) Compliance with the requirements was held to be a condition precedent in *Gamble* v. *Accident Assurance Co.* (1870), 4 I. R. C. L. 204; *Patton* v. *Employers' Liability Assurance Corporation* (1887), 20 L. R. Ir. 93; *Cassel* v. *Lancashire and Yorkshire Accident Insurance Co.* (1885), 1 T. L. R. 495; *Re Williams and Thomas and Lancashire and Yorkshire Accident Insurance Co.* (1902), 19 T. L. R. 82; not so in *Stoneham* v. *Ocean, Railway, and General Accident Insurance Co.* (1887), 19 Q. B. D. 237; *Re Coleman's Depositories, Ltd. and the Life and Health Assurance Association*, [1907] 2 K. B. 798, C. A. (assured not bound where the policy was not delivered to him till after the date of the accident, at which time he was unaware of the condition). Compliance was waived in *Donnison* v. *Employers' Accident and Live Stock Insurance Co.* (1897), 24 R. (Ct. of Sess.) 681; and see p. 539, *ante*. As to conditions generally, see pp. 528, 534, 537, *ante*.

(*q*) 43 & 44 Vict. c. 42; see title MASTER AND SERVANT.

(*r*) 60 & 61 Vict. c. 37, now replaced by the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58); see title MASTER AND SERVANT.

insuring against liability for accidents to third persons has been very largely extended. Under a policy of this description the insurance company undertakes to indemnify the assured against his liability to pay damages and costs in case any person may sustain injury by accident and claim compensation against the assured. It is, therefore, a contract of indemnity, to which the doctrine of subrogation is applicable (*s*). With this exception, the same principles which apply to ordinary accident insurances are applicable to employers' liability insurances of this description, except, of course, so far as they may be excluded or modified by the terms of the contract (*t*).

Statutory subrogation.

Under the Workmen's Compensation Act, 1906 (*a*), if an employer who is insured against any liability to any workman under that statute becomes bankrupt or compounds with his creditors, or, being a company, is wound up, the rights of the employer against the insurers in respect of that liability vest in the workman, and thereupon the insurers have the same rights and remedies, and are subject to the same liabilities (not exceeding the liability which they would have been under to the employer), as if they were themselves the employer (*a*). This enactment does not deprive the insurer of the right to insist that an award under an arbitration clause in the policy is a condition precedent to legal proceedings being taken against the insurer by the workman (*b*).

(*s*) See pp. 490, 518, *ante*. These policies usually contain express provisions giving to the company the conduct of any legal proceedings taken against the assured, and enabling it to use the assured's name for the purpose of enforcing any order for costs etc., or any claim or right of indemnity to which he may be entitled.

(*t*) *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402, 405, C. A. (several persons being injured by an accident to one vehicle, the injury to each person was "an accident" within the meaning of the policy); and see *Captain Boyton's World's Water Show Syndicate* v. *Employers' Liability Assurance Corporation* (1895), 11 T. L. R. 384, C. A. (plaintiffs, proprietors of a show, effected a policy with the defendants by which the latter agreed to repay the plaintiffs all sums for which they might become liable for personal injury caused to any person not in the service of the assured by any accident to the boats used in the show owned by the assured. A boat owned by the plaintiffs came into collision with a water bicycle which was not their property and caused to the person riding it injury for which they had to pay him compensation. It was held that this liability was covered by the policy). As to the right of the insurance company, where the premium is based upon the total amount of wages paid, to have an account of such wages, see *General Accident Assurance Corporation* v. *Day* (1904), 21 T. L. R. 88. A condition requiring the assured to keep a wages book was held, in all the circumstances, not to be a condition precedent, though expressly declared to be so, in *Bradley* v. *Essex and Suffolk Accident Indemnity Society, Ltd.* (1911), 27 T. L. R. 455. (This case is understood to be under appeal.)

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (1). As to the employer's right of indemnity against actual wrongdoers, see *ibid.*, s. 6. As to the redemption by a lump sum of the insurers' liability for weekly payments to an injured workman, see Assurance Companies Act, 1909 (9 Edw. 7, c. 49), ss. 28, 33, Sched. VIII., (D.) 2; and see titles COMPANIES, Vol. V., p. 623; MASTER AND SERVANT.

(*b*) *King* v. *Phœnix Assurance Co.*, [1910] 2 K. B. 666, C. A.

PART VI. Guarantee Policies.

Part VI.—Guarantee Policies.

Differences between ordinary guarantees and guarantees on policies of insurance.

1142. Policies are sometimes issued guaranteeing the solvency of a debtor or the honesty of a person employed (*c*), and to such insurances the same principles of construction are, generally speaking, applicable, as in the case of other contracts of insurance. The ordinary contract of guarantee is not, strictly speaking, a contract *uberrimæ fidei* (*d*). Whether the contract is avoided by reason of concealment of a material fact depends upon the question whether such fact is impliedly represented not to exist (*e*). So, generally, an invitation to guarantee the honesty of a person in a position of trust implies a representation to the surety that the person is honest, so far as the employer knows, and the non-disclosure of a fact materially affecting his honesty would avoid the guarantee (*f*). Moreover, in the case of a continuing guarantee, if the employer, after discovering that the servant or agent is guilty of dishonesty, continues the employment without the knowledge and consent of the surety, the latter will be discharged of subsequent liability; for the surety, upon learning of the dishonesty, would be entitled to put an end to the guarantee (*g*).

A guarantee, however, may be given upon the express condition that a full and true declaration is made of all the circumstances required to be known as the basis of the contract, in which case a misrepresentation or non-disclosure within the meaning of the condition avoids the guarantee independently of fraud (*h*).

These are the general rules relating to ordinary guarantors and sureties (*i*), and though there is no hard and fast line between contracts of guarantee and contracts of insurance, and the rule as to *uberrima fides* is not limited to marine, life and fire insurance (*k*), yet contracts of insurance have, speaking generally, several features in common, both in their character and the way they are affected, distinguishing them from ordinary contracts of guarantee. For instance, in contracts of guarantee the creditor does not himself go to the surety or represent or explain to him the risks to be run, the

(*c*) A policy guaranteeing the honesty of a servant employed in one capacity does not protect the assured against the dishonesty of the same servant in another capacity (*Cosford Union* v. *Poor Law and Local Government Officers Mutual Guarantee Association* (1910), 103 L. T. 463).

(*d*) *North British Insurance Co.* v. *Lloyd* (1854), 10 Exch. 523; see title GUARANTEE, Vol. XV., p. 539).

(*e*) *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469; and see *Railton* v. *Mathews* (1844), 10 Cl. & Fin. 934, H. L.; and title GUARANTEE, Vol. XV., pp. 540, 541.

(*f*) *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482, Ex. Ch., *per* BLACKBURN J., at pp. 503—506, citing *Smith* v. *Bank of Scotland* (1813), 1 Dow, 272, H. L.

(*g*) *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666; see *per* BLACKBURN, J., citing, at p. 681, *Burgess* v. *Eve* (1872), L. R. 13 Eq. 450, 457; *Sanderson* v. *Aston* (1873), L. R. 8 Exch. 73; compare *Durham Corporation* v. *Fowler* (1889), 22 Q. B. D. 394, 423 (where it was thought that *Sanderson* v. *Aston*, *supra*, went too far).

(*h*) See *Benham* v. *United Guarantie and Life Assurance Co.* (1852), 7 Exch. 744; *Towle* v. *National Guardian Assurance Society* (1861), 30 L. J. (CH.) 900, C. A.

(*i*) See also title GUARANTEE, Vol. XV., pp. 539 *et seq.*

(*k*) *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363, 367, 368.

surety often acting from motives of friendship to the debtor; moreover, the risk undertaken is generally known to the surety, and the circumstances generally point to the view that as between the creditor and the surety it was contemplated that the surety should himself ascertain the nature and extent of the risk he was taking upon himself.

Guarantee policies are usually contracts *uberrimæ fidei.*

Where the circumstances which distinguish a contract of guarantee from a contract of insurance do not exist, an agreement undertaking the risk of the insolvency of a debtor or the dishonesty of a person employed will differ from an ordinary guarantee and will, therefore, generally be deemed to be a contract of insurance, and *uberrimæ fidei*, which may be avoided by reason of the concealment of a material fact (*l*). Moreover, the underwriters will be entitled to be subrogated to the rights of the assured against the principal debtor, and his sureties, if any; the underwriters and sureties not standing in the relation of co-sureties (*m*).

Guarantee policy may be avoided also on the same grounds on which ordinary guarantee may be discharged.

1143. A guarantee policy may be avoided not merely on the ground of concealment and misrepresentation, but also on the various other grounds on which the guarantor or surety is discharged in the case of ordinary guarantees; for instance, where the contract the performance of which is guaranteed is altered without the consent of the guarantor, or where the creditor enters into a binding contract with the debtor to give time for the payment of a guaranteed debt etc. The doctrine of contribution between co-sureties applies to guarantee policies (*n*).

Conditions precedent in guarantee policy.

1144. As in the case of other contracts of insurance, where there are conditions which are made conditions precedent or warranties, their breach renders the policy void. Whether a condition does or does not constitute a condition precedent is a question of construction, and is to be determined by the same principle as in the case of all other contracts (*o*).

(*l*) See, on this point, the important judgment of ROMER, L.J., in *Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q. B. 782, C. A. In this case an action was brought upon a policy effected on the solvency of a guarantor. The judgment of the Court of Appeal was overruled in the House of Lords (*Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A. C. 135) on a question of fact (there being no evidence that the undisclosed matter was material to the transaction), but it is to be inferred from the opinions delivered by most of the noble and learned Lords that the non-disclosure of material facts would have had the effect of avoiding the policy if the defendants had not been debarred from taking that point by the course taken at the trial. See also *Dane* v. *Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, C. A.; *Finlay* v. *Mexican Investment Corporation*, [1897] 1 Q. B. 517, and *Shaw* v. *Royce, Ltd.*, [1911] 1 Ch. 138, where the document in question was held to be a policy; and *Re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund, Ltd.* v. *Denton*, [1904] 2 Ch. 178, where it was held to be a guarantee and not an insurance; and see title GUARANTEE, Vol. XV., p. 443.

(*m*) *Parr's Bank* v. *Albert Mines Syndicate* (1900), 5 Com. Cas. 116; *Dane* v. *Mortgage Insurance Co.*, *supra*; *Finlay* v. *Mexican Investment Co.*, *supra.*

(*n*) On the subject of the discharge of the surety, and contribution between co-sureties, see title GUARANTEE, Vol. XV., pp. 526, 535. As to contribution, see also *American Surety Company of New York* v. *Wrightson* (1910), 103 L. T. 663; and pp. 381, 536, *ante.*

(*o*) As to rules relating to conditions precedent, see title CONTRACT, Vol. VII., p. 435; and see pp. 528 *et seq.*, *ante.* The following are the

PART VI. Guarantee Policies.

Condition as to renewal of policy.

1145. Under a condition that at the expiration of the original term the guarantee is to be considered a renewed contract unless two months' notice of termination has been given on either side, the assured, not having given such notice, is liable after the expiration of the term to pay renewed premiums (*p*).

Condition as to notice of claim.

1146. Where a guarantee policy against dishonesty of an employee contains a condition that when any liability has been incurred the party entitled to make a claim shall, immediately upon discovering or receiving notice that such liability has been incurred, forward a statement of particulars, and that the policy is to be void if such notice is not sent within six days, the condition is satisfied if the assured furnishes the particulars as soon as he has ascertained that the insurers have incurred a liability. He is not bound to act on mere suspicion unless the condition requires him to (*q*).

cases as to conditions precedent in contracts of guarantee :—*Benham* v. *United Guarantee and Life Assurance Co.* (1852), 7 Exch. 744 (alleged condition as to checks on servant), distinguished in *Towle* v. *National Guardian Assurance Society* (1861), 30 L. J. (CH.) 900, C. A.; *London Guarantie Co.* v. *Fournley* (1880), 5 App. Cas. 911 (condition as to prosecuting delinquent). But in the last-mentioned case Lord SELBORNE, L.C., differed from the other noble and learned Lords, and Lord BLACKBURN also observed (at p. 917, *ibid.*) that there was little or no use in arguing on the words used in particular cases or citing particular decisions, the question being in each case what appears to be the intention of the contract.

(*p*) *Solvency Mutual Guarantee Society* v. *York* (1858), 27 L. J. (EX.) 487.

(*q*) *Ward* v. *Law Property Assurance and Trust Society* (1856), 4 W. R. 605.

INSURRECTION.

See CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

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INTERPLEADER.

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Part I.—In General.

SECT. 1.—*Nature of Interpleader.*

Definition.

1147. Interpleader is a civil process (*a*) by which a person in possession of property or owing money which is claimed adversely by two or more persons, to one or other of whom alone he is liable (*b*), is enabled, subject to certain conditions (*c*), to be relieved from liability to the claimants, or either of them, with regard to the disposition of the property or money, by compelling them to bring their claims before a legal tribunal for determination at their own expense, and thereby securing for himself the protection of the order of the tribunal as to the disposal of the subject-matter of the dispute (*d*). The relief was given to remedy the hardships, to which persons who had committed no legal wrong might otherwise be subjected, by way of multiplicity of suits, in which they might be compelled to hand over the property to one suitor, while having also to pay its value to another, one of its most useful applications being to relieve sheriffs and bailiffs from some of the difficulties encountered by them in carrying out the process of execution (*e*).

SECT. 2.—*Courts having Jurisdiction.*

In general.

1148. Relief by way of interpleader may be given by the High Court, County Courts (*f*), the Mayor's Court (*g*), the Court of Passage of the City of Liverpool (*h*), and the Salford Hundred Court (*i*).

High Court.

1149. The common law courts from very early times entertained applications for relief by way of interpleader to a limited extent. The Court of Chancery opened its doors more widely, and the mode of seeking relief there by an interpleader bill almost entirely superseded resort to the common law jurisdiction (*k*). The first

(*a*) See title ACTION, Vol. I., p. 4.
(*b*) See p. 585, *post*.
(*c*) See p. 592, *post*.
(*d*) *Desborough* v. *Harris* (1855), 5 De G. M. & G. 439, *per* Lord CRANWORTH, L.C., at p. 455.
(*e*) *Evans* v. *Wright* (1865), 13 W. R. 468; *Discount Banking Co. of England and Wales* v. *Lambarde*, [1893] 2 K. B. 329, C. A., *per* Lord ESHER, M.R., at p. 330; see also *Thompson* v. *Wright* (1884), 13 Q. B. D. 632, 634. See title EXECUTION, Vol. XIV., pp. 1 *et seq.*
(*f*) See p. 627, *post*.
(*g*) See title MAYOR'S COURT, LONDON.
(*h*) See p. 641, *post*.
(*i*) See p. 642, *post*.
(*k*) See title EQUITY, Vol. XIII., p. 57.

statute relating to the subject, hereafter in this title referred to as the Interpleader Act (*l*), was passed in 1831 for the purpose of facilitating the proceedings, and the jurisdiction given thereby was extended by the Common Law Procedure Act, 1860 (*m*). These enactments caused the common law courts to have by far the larger share of the work of giving relief, but the jurisdiction by bill in equity continued until the passing of the Judicature Act, 1873 (*n*). By the rules (*o*) made under the Judicature Act, 1873 (*n*), the procedure and practice in interpleader then obtaining in the common law courts was made to apply to all actions and to all divisions of the High Court, and the Chancery practice was superseded by that of the common law. The Statute Law Revision and Civil Procedure Act, 1883 (*p*), repealed the Interpleader Act (*q*), and all the provisions relating to interpleader contained in the Common Law Procedure Act, 1860 (*r*), with one exception (*s*); and a body of rules (*t*) was promulgated containing provisions similar to those of the repealed statutes, modifying the practice of the Court of Chancery and prescribing a new procedure in interpleader cases (*u*).

These rules, together with the Common Law Procedure Act, 1860 (*a*), s. 17, now contain all the provisions with regard to interpleader in the High Court (*b*).

Part II.—Interpleader in the High Court.

SECT. 1.—*Cases in which Relief may be given.*

SUB-SECT. 1.—*In General.*

(i.) *Persons to whom Relief is given.*

1150. Relief by way of interpleader is given to two classes of persons:—(1) To sheriffs and other officers (*c*) who are charged In general

(*l*) Stat. (1831) 1 & 2 Will. 4, c. 58, repealed (with savings) by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), ss. 3, 7, and Schedule (see *infra*), and hereafter in this title referred to as the "Interpleader Act."

(*m*) 23 & 24 Vict. c. 126.

(*n*) 36 & 37 Vict. c. 66.

(*o*) R. S. C., 1875, Ord. 1, r. 2.

(*p*) 46 & 47 Vict. c. 49.

(*q*) Stat. (1831) 1 & 2 Will. 4, c. 58.

(*r*) 23 & 24 Vict. c. 126, ss. 12—18.

(*s*) *I.e.*, *ibid.*, s. 17.

(*t*) R. S. C., Ord. 57.

(*u*) See *Webb* v. *Shaw* (1886), 16 Q. B. D. 658, *per* MATHEW, J., at p. 662; *Dawson* v. *Fox* (1885), 14 Q. B. D. 377, C. A., *per* LINDLEY, L.J., at p. 379; *Lyon* v. *Morris* (1887), 19 Q. B. D. 139, *per* DAY, J., at p. 142, and *per* WILLS, J., at p. 145; *Reading* v. *London School Board* (1886), 16 Q. B. D. 686, *per* WILLS, J., at p. 690. This must be borne in mind in consulting older cases, many of which are no longer law.

(*a*) 23 & 24 Vict. c. 126.

(*b*) *Lyon* v. *Morris*, *supra*; *Reading* v. *London School Board*, *supra*; *Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546, C. A., *per* A. L. SMITH, L.J., at p. 551. In a case under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) it was considered that the Act did not extend to the colonies (*Colonial Bank* v. *Warden* (1846), 5 Moo. P. C. C. 340).

(*c*) The words "or other officer" in R. S. C., Ord. 57, r. 1 (b) include the lord

SECT. 1. Cases in which Relief may be given.

with the execution of process by or under the authority of the High Court, when a claim is made by any person other than the person against whom the process is issued to any money, goods, or chattels taken, or intended to be taken, in execution under any process, or to the proceeds of sale of or value of any such goods or chattels (*d*); and (2) to other persons, who may be called stakeholders (*e*), using the term in its widest sense, who are under liability for any debt, money (*f*), goods, or chattels (*g*) for or in respect of which they are, or expect to be, sued by two or more persons making adverse claims thereto (*h*).

(ii.) *Guiding Principle in granting Relief.*

Relief in discretion of the court.

1151. The guiding principle as to when relief will be granted is that the granting of it is discretionary (*i*). On the one hand the relief cannot be claimed as of right, while on the other, provided the applicant fulfils certain conditions precedent (*k*), the jurisdiction to grant it is not limited by any precise enactment, and the court is left free to exercise its power when it is satisfied that in the circumstances of the particular case then under consideration it is just and proper that relief should be granted (*l*).

(iii.) *Where Equitable Title involved.*

Relief now given though equitable title involved.

1152. Since the Judicature Act, 1873 (*m*), the fact that one or both of the parties claim the subject-matter of the dispute under an equitable title is no bar to the granting of relief in all divisions of the High Court (*n*).

of a manor charged with the execution of writs within the manor (*Ibbotson* v. *Chandler* (1841), 9 Dowl. 250), and a receiver of the property of a judgment debtor (*Levasseur* v. *Mason and Barry*, [1891] 2 Q. B. 73, C. A.), and in Ireland a coroner, who has duties to perform similar to those of a sheriff (see *Quinton* v. *Butt* (1860), 5 Ir. Jur. (N. S.) 130). See also titles PUBLIC AUTHORITIES AND PUBLIC OFFICERS; SHERIFFS AND BAILIFFS.

(*d*) R. S. C., Ord. 57, r. 1 (b).

(*e*) See *Matthew* v. *Northern Assurance Co.* (1878), 47 L. J. (CH.) 562, *per* JESSEL, M.R., at p. 565.

(*f*) It has been held that a contested claim to the reward advertised for the apprehension of a felon was not a claim within the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*) (*Grant* v. *Fry* (1835), 4 Dowl. 135; *Allis* v. *Lee* (1835), 5 L. J. (C. P.) 83; but see *contra*, *Gay* v. *Pitman* (1837), 1 Jur. 775).

(*g*) This includes deeds or other papers (*Smith* v. *Wheeler* (1835), 3 Dowl. 431; *Walker* v. *Ker* (1843), 12 L. J. (EX.) 204; see *Roberts* v. *Bell* (1857), 7 E. & B. 323); and choses in action (*Robinson* v. *Jenkins* (1890), 24 Q. B. D. 275, C. A.).

(*h*) R. S. C., Ord. 57, r. 1 (a).

(*i*) *Gerhard* v. *Montague & Co.* (1889), 38 W. R. 76; see *Re Baker, Nichols* v. *Baker* (1890), 44 Ch. D. 262, C. A.; *Julius* v. *Oxford* (*Lord Bishop*) (1880), 5 App. Cas. 214, *per* Lord SELBORNE, at p. 235; *R.* v. *Turner* (*Judge*), [1897] 1 Q. B. 445.

(*k*) See p. 592, *post*.

(*l*) *Gerhard* v. *Montague & Co.*, *supra*; *Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546, 551, C. A.

(*m*) 36 & 37 Vict. c. 66.

(*n*) *Duncan* v. *Cashin* (1875), L. R. 10 C. P. 554; *Engelbach* v. *Nixon* (1875), L. R. 10 C. P. 645; *Jenkinson* v. *Brandley Mining Co.* (1887), 19 Q. B. D. 568; *Jennings* v. *Mather*, [1901] 1 K. B. 108, 115; *Usher* v. *Martin* (1889), 24 Q. B. D. 272. For some time after the passing of the Interpleader Act (stat. (1831) 1 & 2

(iv.) *Estoppel by Personal Obligation to One of the Parties.*

Relief now given though applicant has made contract with one of the parties.

1153. The entry of the applicant into a contract of bailment, agency, or other personal engagement with one of the claimants, even though the applicant might be estopped by the contract from denying the right of that claimant in an action brought against the applicant by the claimant, and even though the relief which can be given is not complete (*o*), is no bar to the granting of relief (*p*). Where there is a question of estoppel, the estoppel may be disregarded and an issue directed between the plaintiff and claimant, but the order made should not shut out the plaintiff from asserting any claim he may have against the defendant on the estoppel, but should leave it open to him to assert that claim if defeated on the issue (*q*).

(v.) *Claims differing in Extent.*

Relief now given where claims not co-extensive.

1154. Relief may be granted although the applicant admits liability as to part of the claim only (*a*), and although the claims made against him are not co-extensive (*b*).

Will. 4, c. 58) (see note (*l*), p. 581, *ante*), relief was denied by some of the common law courts to a claimant under an equitable title (see, for examples, *Langton* v. *Horton* (1841), 3 Beav. 464; *Barclay* v. *Curtis* (1821), 9 Price, 661; *Hurst* v. *Sheldon* (1863), 13 C. B. (N. S.) 750; *Sturgess* v. *Claude* (1832), 1 Dowl. 505; *Evans* v. *Wright* (1865), 13 W. R. 468; *Roach* v. *Wright* (1841), 8 M. & W. 155); but this refusal to grant relief was put an end to by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126); see *Rusden* v. *Pope* (1868), L. R. 3 Exch. 269, BRAMWELL, B., dissenting; *Bank of Ireland* v. *Perry* (1871), L. R. 7 Exch. 14, 20.

(*o*) *Robinson* v. *Jenkins* (1890), 24 Q. B. D. 275, C. A.; *Rogers, Sons & Co.* v. *Lambert & Co.*, [1891] 1 Q. B. 318, C. A., *per* LINDLEY, L.J., at p. 326; *Attenborough* v. *St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, 455, 457, 459, C. A.; *Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546, C. A., *per* A. L. SMITH, L.J., at p. 551. See also titles AGENCY, Vol. I., p. 200; BAILMENT, Vol. I., pp. 562, 563; ESTOPPEL, Vol. XIII., pp. 406, 407.

(*p*) It was formerly the rule in equity that a plaintiff in an interpleader suit was not entitled to relief where he had incurred a personal obligation to one of the defendants independently of the question between the defendants themselves (*Cooper* v. *De Tastet* (1829), Taml. 177; *Crawshay* v. *Thornton* (1837), 2 My. & Cr. 1; *Patorni* v. *Campbell* (1843), 1 Dow. & L. 397; *Hoggart* v. *Cutts* (1841), Cr. & Ph. 197; *Pearson* v. *Cardon* (1831), 2 Russ. & M. 606; *Martinius* v. *Helmuth and Schmidt* (1815), Coop. G. 245; *Suart* v. *Welsh* (1839), 4 My. & Cr. 305; *Braik* v. *Douglas* (1828), 4 My. & Cr. 320, n.; *Nickolson* v. *Knowles* (1820), 5 Madd. 47; *Watts* v. *Hammond* (1855), 3 W. R. 312; but see *Smith* v. *Hammond* (1833), 6 Sim. 10; and *Wright* v. *Ward* (1827), 4 Russ. 215, 220). This principle was to some extent adopted by the common law courts (*Slaney* v. *Sidney* (1845), 14 M. & W. 800; *Lindsey* v. *Barron* (1848), 6 C. B. 291, 294; *James* v. *Pritchard* (1840), 7 M. & W. 216; *Turner* v. *Kendal Corporation* (1844), 13 M. & W. 171; *Baker* v. *Bank of Australasia* (1857), 1 C. B. (N. S.) 515; *Barr* v. *Ward* (1837), 2 M. & W. 844; *Deller* v. *Prickett* (1850), 15 Q. B. 1081; *Horton* v. *Devon (Earl)* (1849), 4 Exch. 497) until the passing of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), which enabled them to disregard the equity rule (*Meynell* v. *Angell* (1862), 32 L. J. (Q. B.) 14; *Best* v. *Hayes* (1863), 1 H. & C. 718 (auctioneer's commission), overruling *Mitchell* v. *Hayne* (1824), 2 Sim. & St. 63; see also *Yates* v. *Farebrother* (1819), 4 Madd. 239; *Tanner* v. *European Bank* (1866), L. R. 1 Exch. 261).

(*q*) *Ex parte Mersey Docks and Harbour Board, supra.*

(*a*) *Reading* v. *London School Board* (1886), 16 Q. B. D. 686, 689.

(*b*) *Attenborough* v. *St. Katharine's Dock Co., supra, per* BRETT, L.J., at p. 459; *Ex parte Mersey Docks and Harbour Board, supra.* The Court of Chancery formerly refused relief where the litigants did not claim exactly the same amount of debt or duty (*Moore* v. *Usher* (1835), 4 L. J. (CH.) 205; *Diplock* v. *Hammond* (1854), 2 Sm. & G. 141; *Mitchell* v. *Hayne* (1824), 2 Sim. & St. 63; *Glyn* v.

SECT. 1.

(vi.) *Claims not having a Common Origin.*

Cases in which Relief may be given.

1155. The court may entertain applications for relief, though the titles have not a common origin but are adverse to and independent of one another (*c*).

Where claims are independent.

SUB-SECT. 2.—*Stakeholder's Interpleader.*

(i.) *Assignment of Debt.*

Relief to debtor where debt assigned.

1156. Provision is made by the Judicature Act, 1873 (*d*), enabling the person liable in respect of any debt or legal chose in action, who has notice of an absolute assignment by writing (*e*) under the hand of the assignor of the debt or chose in action, to commence interpleader proceedings where he has also received notice that the assignment is disputed by the assignor or anyone claiming under him, or notice of any other opposing or conflicting claim to the debt or chose in action.

(ii.) *Wagering Contracts.*

Cases in which relief given or refused.

1157. The court in exercising its discretionary power will generally refuse relief where the applicant is a stakeholder of money deposited with him by parties to a wagering contract, on the ground that the stakeholder would have a good defence to an action brought upon the contract, and that the law might be evaded if the assistance of the court were secured in an indirect way so as to enable the winner to recover his winnings as such (*f*). But this principle does not seem to have been always acted upon (*g*), and the extent to

Duesbury (1840), 11 Sim. 139). This principle was followed to some extent by the common law courts (*Patorni* v. *Campbell* (1843), 1 Dow. & L. 397; *Slaney* v. *Sidney* (1845), 14 M. & W. 800; but see *Carr* v. *Edwards* (1839), 8 Dowl. 29 (where an issue was directed between a plaintiff claiming the whole of moneys in stakeholder's hands, and a claimant claiming part only)) until the passing of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126) (see *Best* v. *Hayes* (1863), 1 H. & C. 718; and see further, p. 586, *post*).

(*c*) *Meynell* v. *Angell* (1862), 32 L. J. (Q. B.) 14; *Best* v. *Hayes*, *supra*; see also R. S. C., Ord. 57, r. 3. It was formerly considered an essential condition that the claims should have a common origin, or that there should be some privity between them (see *James* v. *Pritchard* (1840), 8 Dowl. 890; *Turner* v. *Kendal Corporation* (1844), 13 M. & W. 171; *Baker* v. *Bank of Australasia* (1857), 1 C. B. (N. S.) 515), but this was put an end to by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 12 (repealed).

(*d*) 36 & 37 Vict. c. 66, s. 25 (6).

(*e*) See title CHOSES IN ACTION, Vol. IV., p. 367. This remedy is an alternative one to payment into court in conformity with the provisions of the Acts for the relief of trustees; see title TRUSTS AND TRUSTEES.

(*f*) *Applegarth* v. *Colley* (1842), 2 Dowl. (N. S.) 223 (trotting match, stakes deposited by claimants. Held, applicant had a good defence to action brought against him by one of the parties, and, therefore, could not interplead); *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 501, *per* ROMER, L.J., at p. 503 (billiard match; relief granted by court below, acquiesced in by Court of Appeal on ground that the only question at issue was between a bankrupt and his own trustee in bankruptcy, where the former was endeavouring to set up against the latter the illegality of the title by which he himself became entitled to the money in question).

(*g*) See *Dowson* v. *Macfarlane* (1899), 81 L. T. 67, C. A. (trotting match where the claimants were the depositors of stake, both claiming to have won. Held to be a proper case for relief). This case seems out of harmony with the *dicta* in *Shoolbred* v. *Roberts*, *supra*.

SECT. 1. Cases in which Relief may be given.

which it applies appears to be doubtful. It is submitted that where both of the claimants are the parties to the contract and the object of the interpleader is to obtain the decision of the court as to which of them is entitled to the stakes deposited, the court should refuse relief, but that there is no objection to it being granted in cases where both the claimants are not the parties to the contract, and the illegality of the transaction is set up against a party who was not privy to it (*h*).

(iii.) *Unliquidated Damages.*

Unliquidated damages.

1158. Where either of the claims is substantially one for unliquidated damages the case is outside the scope of interpleader, but where the main subject of the dispute is specific goods or money the existence of a claim for damages will not in itself bar the applicant from obtaining the relief sought (*i*).

(iv.) *Interpleader by Garnishee.*

No interpleader after garnishee order absolute.

1159. Where a garnishee order absolute has been made attaching a sum of money in the hands of the garnishee for the payment of a judgment debt, and a claim is made to the same sum by another claimant, the garnishee cannot interplead, but is bound to comply with the terms of the order, by which he is protected (*k*).

(v.) *Applicant must not be liable to both Claimants.*

Applicant must be liable to one of the parties only.

1160. It is of the essence of interpleader that the applicant should be liable to one or other only of the claimants in respect of the same thing which is the subject-matter of the proceedings (*l*), and relief has been refused in circumstances where the applicant was or might be liable to both (*m*). Subject to the power of the court at the present day to grant relief although the claims are not co-extensive and the applicant denies liability in part to either claimant (*n*), this principle still holds good (*o*).

(vi.) *Subject-matter must be in Possession of Applicant.*

Subject-matter of proceedings must be in possession of the applicant.

1161. It is essential that the applicant for relief should be in possession of the subject-matter of the dispute where the claim is

(*h*) See *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497, C. A., *per* ROMER, L.J. See also title GAMING AND WAGERING, Vol. XV., p. 271.

(*i*) See *Walter* v. *Nicholson* (1838), 6 Dowl. 517; *Wright* v. *Freeman* (1879), 48 L. J. (Q. B.) 276; *Ingham* v. *Walker* (1887), as reported in 31 Sol. Jo. 271; and compare *Attenborough* v. *St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, C. A.

(*k*) *Randall* v. *Lithgow* (1884), 12 Q. B. D. 525. See, however, *Richter* v. *Laxton* (1878), 48 L. J. (Q. B.) 184, where an issue was ordered in special circumstances, and *Nelson* v. *Barter* (1864), 10 Jur. (N. S.) 832. As to the determination of questions before order absolute where the garnishee disputes liability or there are adverse claims, see title EXECUTION, Vol. XIV., pp. 98, 99.

(*l*) *Crawford* v. *Fisher* (1842), 1 Hare, 436, 441.

(*m*) *Farr* v. *Ward* (1837), 2 M. & W. 844; *Cochrane* v. *O'Brien* (1845), 2 Jo. & Lat. 380, 388.

(*n*) See p. 583, *ante*.

(*o*) See *Victor Söhne* v. *British and African Steam Navigation Co., Ltd.*, [1888] W. N. 84; *Sablicich* v. *Russell* (1866), L. R. 2 Eq. 441; *Greatorex* v. *Shackle*, [1895] 2 Q. B. 249 (where two auctioneers claimed commission in respect of the sale of the same house, and it was held that interpleader would not lie as the claims were not for the same thing). See p. 586, *post*.

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for a specific article or fund, since he has to satisfy the court that he is willing to pay or transfer it into court or to dispose of it as the court may direct (*p*). Where he has parted with the possession he may be denied relief even though he undertakes to pay over the value to the party found to be entitled (*q*). So also if, after receiving notice of adverse claims to goods, he sells them, and disposes of a portion of the proceeds in accordance with the directions of one of the parties, he may disentitle himself to relief (*a*).

(vii.) *Action must be Pending or Expected.*

Litigation must be either actual or threatened.

1162. To entitle a stakeholder to relief it is essential that he is, or expects to be, sued by two or more parties (*b*). It is not necessary that he be actually sued (*c*), but there must be some real foundation for the expectation. A mere anticipation, without any intimation having been received, is not enough (*d*). Where, therefore, the applicant knows that the rival claims are about to be settled by litigation between the claimants he cannot get relief by interpleader (*e*). So also where the allegation that an action is threatened is known to be groundless, interpleader proceedings, if commenced, may be dismissed with costs (*f*).

(viii.) *Necessity of Real and Adverse Claims.*

The claims must be real and adverse.

1163. To entitle a stakeholder to relief it is essential that the claims made upon him should be at least two in number and should be adverse (*g*). The conflict between the claimants must be a real one, so that where the applicant is not under any obligation to one of the claimants (*h*), or where he can, without incurring any liability, pay the subject-matter of the claim to one of the claimants (*i*), he is not entitled to relief. A mere pretext of a conflicting claim is not sufficient, and the court must be satisfied that there is a question to be tried (*k*). The claims must be adverse in the sense of being claims to the whole or part of the same money or goods or thing. They may arise out of the same transaction and still be so different as to prevent relief being granted (*l*).

(*p*) See p. 594, *post*.

(*q*) *Burrett* v. *Anderson* (1816), 1 Mer. 405; *Meux* v. *Bell* (1833), 6 Sim. 175.

(*a*) *Poland* v. *Coall* (1873), 7 I. R. C. L. 108.

(*b*) R. S. C., Ord. 57, r. 1 (a).

(*c*) *Ibid.*; *Morgan* v. *Marsack* (1816), 2 Mer. 107.

(*d*) *Harrison* v. *Payne* (1836), 2 Hodg. 107; and *Sharpe* v. *Redman* (1837), Will. Woll. & Dav. 375 (where it was held that something more must appear on the affidavit in support of the application than that some third party was expected to sue where no intimation of such an intention had been given, and it was not a necessary consequence of the facts that he should sue).

(*e*) *Diplock* v. *Hammond* (1854), 5 De G. M. & G. 320, C. A.

(*f*) *Cook* v. *Rosslyn* (*Earl*) (1861), 3 Giff. 175.

(*g*) R. S. C., Ord. 57, r. 1 (a).

(*h*) *East India Co.* v. *Edwards* (1811), 18 Ves. 376; *Wright* v. *Ward* (1827), 4 Russ. 215; *Glynn* v. *Locke* (1842), 3 Dr. & War. 11.

(*i*) *Myers* v. *United Guarantee and Life Assurance Co.*, *United Guarantee and Life Assurance Co.* v. *Cleland* (1855), 7 De G. M. & G. 112, C. A., *per* TURNER, L.J., at p. 127; see *Cook* v. *Rosslyn* (*Earl*) (1861), 3 Giff. 175; *Desborough* v. *Harris* (1855), 5 De G. M. & G. 439, 455 (mortgagor and mortgagee).

(*k*) *Cochrane* v. *O'Brien* (1845), 2 Jo. & Lat. 380, 389.

(*l*) *Greatorex* v. *Shackle*, [1895] 2 Q. B. 249.

(ix.) *Examples of Relief.*

SECT. 1. Cases in which Relief may be given.

Cases in which relief has been granted.

1164. Relief has been given to the obligor of a bond when sued by executors of a will, when a claim was also made by trustees for a legatee under the will (*m*); to executors of a debtor when the whole debt due was claimed by one party, another claiming a part of it, and a third claiming in respect of a lien for costs (*n*); to a tenant for life where conflicting claims were made as to a charge on his interest (*o*); to acceptors of a bill of exchange sued by the holder after notice from a third party not to pay on the ground of fraud (*p*); where actions have been brought against an acceptor by two persons claiming to be lawful owners of a bill (*q*), or where the proceeds of sale of a ship in the form of a bill of exchange in the hands of a third party were claimed adversely by two claimants (*r*); to warehousemen or wharfingers sued by the holder of a warrant for delivery of goods, after notice by the consignor not to deliver on the ground of fraud or other grounds (*s*); to a debtor, sued by the assignee of debt after notice of adverse claim from the trustee in bankruptcy of the assignor (*t*); to brokers where goods or the proceeds of their sale were claimed adversely (*a*); to a purchaser of goods, sued by assignees of the seller, a factor for sale, who became bankrupt subsequently to the sale, and a claim was made by the consignor of the goods to the factor (*b*); to bankers after receipt of notice by a person alleging himself to be the husband of a depositor, not to repay the money to her, and of notice by the depositor that she disputed the marriage and had instituted criminal proceedings (*c*), and where the deposit was made by a married woman representing herself to be a widow, and claims were made by her husband and a transferee (*d*); to insurance companies where the policy moneys were claimed by two or more claimants (*e*);

(*m*) *Wright* v. *Ward* (1827), 4 Russ. 215.
(*n*) *Jones* v. *Thomas* (1854), 2 Sm. & G. 186.
(*o*) *Vyvyan* v. *Vyvyan* (1861), 30 Beav. 65.
(*p*) *Gerhard* v. *Montague & Co.* (1889), 38 W. R. 76.
(*q*) *Regan* v. *Serle* (1840), 9 Dowl. 193.
(*r*) *Gibbs* v. *Gibbs* (1858), 6 W. R. 415.
(*s*) *Attenborough* v. *St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, C. A. See also *Mason* v. *Hamilton* (1831), 5 Sim. 19; *Crawshay* v. *Thornton* (1837), 2 My. & Cr. 1; *Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546, C. A.; *De Rothschild Frères* v. *Morrison, Kekewich & Co., La Banque de Paris et des Pays Bas* v. *Same, La Banque de France* v. *Same* (1870), 24 Q. B. D. 750, C. A.
(*t*) *Re Hilton, Ex parte March* (1892), 67 L. T. 594.
(*a*) *Suart* v. *Welsh* (1839), 4 My. & Cr. 305; see *Braik* v. *Douglas* (1828), 4 My. & Cr. 320, n.
(*b*) *Johnson* v. *Shaw* (1842), 4 Man. & G. 916.
(*c*) *Crellin* v. *Leyland* (1842), 6 Jur. 733.
(*d*) *Costello* v. *Martin* (1867), 15 W. R. 548.
(*e*) *Fenn* v. *Edmonds* (1846), 5 Hare, 314; *Prudential Assurance Co.* v. *Thomas* (1867), 3 Ch. App. 74; *Re Haycock's Policy* (1876), 1 Ch. D. 611, 616. In *Desborough* v. *Harris* (1855), 5 De G. M. & G. 439, it was held that a bill of interpleader would not lie by an insurance company against the assignee for value of a policy taken out by the assignor on the life of another by whom on the death of the assured the moneys were claimed, and against the official assignees of the assignor who had since become bankrupt, because the assignor had no title and the title of the assignees in bankruptcy was subordinate to that of the assignee for value. It has been held that a bill of interpleader in equity by the

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to stockbrokers, transferees for sale, of shares claimed by a person other than the transferor (*f*).

SUB-SECT. 3.—*Sheriff's Interpleader.*

(i.) *In General.*

Relief under the Interpleader Act.

1165. No substantial relief was afforded to sheriffs (*g*) by way of interpleader until after the passing of the Interpleader Act (*h*). Even then the common law courts were not disposed to encourage applications by sheriffs, and at first were disinclined to allow them costs, as they were considered to be sufficiently assisted by the indemnity afforded to them (*i*). They were warned, too, that applications under the Interpleader Act (*h*) would not be considered as a matter of course, but that it was their duty to make careful inquiry into the matter, and that it was only when there were conflicting claims which they could not decide for themselves that they were to seek the assistance of the courts (*k*). In considering the earlier cases decided under the Interpleader Act (*h*) this leaning must be borne in mind, since, in some respects, the present practice is almost the very reverse to that originally prevailing. But on the other hand, there are circumstances under which the court may still refuse to exercise its discretionary power in the sheriff's favour.

(ii.) *Claim by Landlord.*

Landlord's right to rent owing by execution debtor.

1166. A sheriff who, in levying process, is met with a claim by the landlord for rent, cannot interplead unless the landlord is first paid (*l*); nor does interpleader lie under any conditions to determine the rights of the execution creditor and the landlord claiming rent, since the landlord does not claim any goods, chattels, or their proceeds, as being his own property (*m*). Interpleader may, however, lie where fraud or collusion between the landlord and the execution debtor is alleged (*n*). Where the goods seized do not belong to the

captain of a ship would not lie where suits had been instituted in the Court of Admiralty on the ground, *inter alia*, that the proceedings were not against the captain, but against the ship.

(*f*) *Robinson* v. *Jenkins* (1890), 24 Q. B. D. 275, C. A.; see *Sablicich* v. *Russell* (1866), L. R. 2 Eq. 441; but see *contra*, *Lowe* v. —— (1818), 3 Madd. 277.

(*g*) As to sheriffs generally, see title SHERIFFS AND BAILIFFS.

(*h*) Stat. (1831) 1 & 2 Will. 4, c. 58.

(*i*) *Oram* v. *Sheldon* (1835), 3 Dowl. 640.

(*k*) *Bishop* v. *Hinxman* (1833), 2 Dowl. 166, 167.

(*l*) Landlord and Tenant Act, 1709 (8 Anne, c. 18), s. 1; *Clarke* v. *Lord* (1833), 2 Dowl. 55, 227; *Haythorn* v. *Bush* (1834), 2 Dowl. 641; see *Lawson* v. *Carter*, [1894] W. N. 6; *Cropper* v. *Warner* (1883), Cab. & El. 152. As to the landlord's right to payment of rent before removal of the goods, see *Hughes* v. *Smallwood* (1890), 25 Q. B. D. 306, *per* Lord COLERIDGE, C.J., at p. 308; and titles DISTRESS, Vol. XI., pp. 174 *et seq.*; EXECUTION, Vol. XIV., pp. 53 *et seq.*; LANDLORD AND TENANT. As to the effect of outstanding rent upon the sheriff's right to levy, see title EXECUTION, Vol. XIV., pp. 51, 53. As to the landlord's right when bankruptcy supervenes, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 291, 292; DISTRESS, Vol. XI., p. 176.

(*m*) *Bateman* v. *Farnsworth* (1860), 29 L. J. (EX.) 365.

(*n*) *Tooks* v. *Finley* (1821), Rowe, 426; see *Nixon* v. *Wilks* (1859), 4 Ir. Jur. (N. S.) 242.

tenant, but are the property of a claimant, and the sheriff pays over a part of the proceeds of the sale to the landlord who claims his rent, instead of paying the whole of the proceeds into court under the order for sale, he may have to pay it again to the claimant on the latter establishing his claim upon the trial of the issue, as payment to the landlord of the execution debtor is no answer to the claimant (*o*).

(iii.) *Claim by Mortgagee.*

Mortgagee in possession.

1167. Under the Interpleader Act it was held that the sheriff was not entitled to interplead where he had seized growing crops on land in the possession of a mortgagee, since the mortgagee's claim was paramount to that of the execution creditor, and there were therefore no conflicting claims (*p*). But this does not apply to a mortgage of chattels by way of a bill of sale (*q*).

(iv.) *Partnership Property.*

Partnership property.

1168. Interpleader proceedings do not lie where the property in dispute is partnership property and the claim involves the taking of accounts (*r*).

(v.) *Withdrawal by Sheriff.*

Sheriff may withdraw if execution creditor admits the claim.

1169. Where the execution creditor gives notice to the sheriff or his officer that he admits the claim of the claimant, the sheriff may thereupon withdraw from possession of the goods claimed, and may apply for an order protecting him from any action in respect of the seizure and possession (*s*). Where, however, without any such admission by the execution creditor, the sheriff on meeting with a claim either withdraws without seizure (*t*), or seizes and then withdraws simply (*a*), or delivers over all or part of the goods (*b*) or pays over the proceeds to one of the parties (*c*), he may be refused relief, nor will an offer to bring the amount into court necessarily entitle him to the relief (*d*).

(*o*) *White* v. *Binstead* (1853), 13 C. B. 304.

(*p*) *Bishop* v. *Hinxman* (1833), 2 Dowl. 166, 167 (where the sheriff had to pay the costs, as it was held he had no grounds for coming to the court for relief); see also *Murdock* v. *Taylor* (1840), 8 Scott, 604 (where a defendant was sued for rent and was given notice by a mortgagee not to pay the rent to the plaintiff: on the mortgagee declining to appear, the court ordered each party to pay his own costs of the application for relief).

(*q*) See title BILLS OF SALE, Vol. III., p. 62; and p. 604, *post*.

(*r*) *Holmes* v. *Mentze* (1835), 4 Dowl. 300; *Anon.*, [1875] W. N. 204; see *Dibb* v. *Brooke & Sons*, [1894] 2 Q. B. 338; and title PARTNERSHIP.

(*s*) R. S. C., Ord. 57, r. 16A. It was formerly held that where a sheriff had seized goods which were claimed by a third party, and the execution creditor admitted the claim and withdrew his execution, the sheriff was not entitled to apply for relief for the mere purpose of protecting himself from an action, since, having withdrawn from possession, the whole matter was at an end (*Moore* v. *Hawkins* (1894), 43 W. R. 235, following *Kirk* v. *Almond* (1832), 2 L. J. (EX.) 13; *Sodeau* v. *Shorey* (1896), 74 L. T. 240, C. A.).

(*t*) *Holton* v. *Guntrip* (1837), 6 Dowl. 130.

(*a*) *Crump* v. *Day* (1847), 4 C. B. 760.

(*b*) *Braine* v. *Hunt* (1834), 2 Dowl. 391 (delivery to claimant).

(*c*) *Scott* v. *Lewis* (1835), 4 Dowl. 259 (payment to execution creditor); *Anderson* v. *Calloway* (1832), 1 Dowl. 636 (payment to claimant); see *Cropper* v. *Warner* (1883), Cab. & El. 152.

(*d*) *Inland* v. *Bushell* (1836), 5 Dowl. 147.

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Cases in which Relief may be given.

(vi.) *Difficulty arising from Sheriff's own Act.*

Relief may be refused where sheriff in fault.

1170. Where the difficulty arises from the sheriff's own wrongdoing the court may refuse him relief (*e*). Thus, where he has seized goods which he knew were not the goods of the execution debtor (*f*), or which were in the custody of a receiver appointed by the court (*g*), relief will not be given, though it would be otherwise where the sheriff has made an honest mistake (*h*). Where the sheriff is guilty of negligence in not having a deputy for the receipt of writs, he is only entitled to relief upon the terms of remaining liable to the execution creditor for any loss he may sustain by such negligence (*i*).

(vii.) *Under-Sheriff acting for Claimant.*

Under-sheriff must not be a claimant or acting for one.

1171. An under-sheriff who is a solicitor cannot act as such on behalf of a claimant as against an execution creditor, but the fact that he has directed a claim to be made on behalf of a claimant for whom he had previously acted as solicitor is not sufficient, in the absence of collusion, or dishonest conduct, or anything to prejudice the execution creditor, to prevent relief being given (*k*). Where, however, the under-sheriff postpones execution of the process entrusted to him, in order that other creditors for whom he has formerly acted as solicitor may take bankruptcy proceedings, or gives information to other creditors for whom he has acted, which may have the effect of defeating or delaying the execution creditor's rights, the sheriff may still be disentitled to relief (*l*). Where the under-sheriff is himself the execution creditor or his partner, he is not entitled to interplead (*m*).

(viii.) *Necessity of Real and Adverse Claims.*

Claims must be real and adverse.

1172. It is necessary that the claim made by the third party be a real one (*n*). Mere alarm that a claim will be made is not sufficient (*o*), nor is mere notice that bankruptcy proceedings have been commenced (*p*). But a sheriff may be entitled to relief although the claim is obviously bad, unless the execution creditor will indemnify him (*q*); so, also, if the claim by the claimant be not

(*e*) See the *dictum* of KINDERSLEY, V.-C., in *Tufton* v. *Harding* (1859), 6 Jur. (N. S.) 116, and *Winter* v. *Bartholomew* (1856), 11 Exch. 704, *per* ALDERSON, B., at p. 708.

(*f*) *Tufton* v. *Harding*, *supra*; *Lewis* v. *Jones* (1836), 2 M. & W. 203.

(*g*) *Russell* v. *East Anglian Rail. Co.* (1850), 3 Mac. & G. 104.

(*h*) *Smith* v. *Critchfield* (1885), 14 Q. B. D. 873, C. A., *per* BRETT, M.R., at p. 878; *Winter* v. *Bartholomew*, *supra*; see *Dalton* v. *Furness* (1866), 35 Beav. 461; and p. 603, *post*.

(*i*) *Brackenbury* v. *Laurie* (1834), 3 Dowl. 180.

(*k*) *Holt* v. *Frost* (1858), 3 H. & N. 821. Formerly a stricter practice prevailed (*ibid.*, *per* POLLOCK, C.B., at p. 824).

(*l*) *Duddin* v. *Long* (1837), 3 Dowl. 139; *Cox* v. *Balne* (1845), 14 L. J. (Q. B.) 95; and see further, pp. 592, 593, *post*.

(*m*) *Ostler* v. *Bower* (1835), 4 Dowl. 605.

(*n*) Compare p. 586, *ante*.

(*o*) *Isaac* v. *Spilsbury* (1833), 2 Dowl. 211.

(*p*) *Bently* v. *Hook* (1834), 2 Dowl. 339.

(*q*) *Allen* v. *Evans* (1833), 3 L. J. (EX.) 53.

adverse in the sense that he claims the money or goods as belonging to him (*r*). Questions of priority of time between different execution creditors are not such claims as would entitle a sheriff to interplead (*s*), but where there is in addition to the question of priority a claim against both execution creditors, relief may be given (*a*).

(ix.) *Actual Seizure not necessary.*

Relief may be given though money or goods not actually seized.

1173. Relief may be given when the money, goods, or chattels are "taken or intended to be taken" (*b*) in execution under any process (*c*).

The fact that the goods, money, or chattels are in the possession of the execution debtor's trustees under a deed does not prevent a sheriff from applying for relief (*d*).

(x.) *Subject-matter of Interpleader.*

Sheriff may interplead though paid out by claimant.

1174. The sheriff may apply for relief by way of interpleader where a claim is made to any money, goods, or chattels, taken or intended to be taken in execution, under any process, or to the proceeds or value of any such goods or chattels (*e*).

Where the claimant pays out the sheriff under protest, the money so received by the sheriff is "the proceeds of goods taken in execution," and may well be within the words "money taken in execution" (*f*).

(*r*) *Smith* v. *Saunders* (1877), 37 L. T. 359 (where an execution was issued by the defendant in an original action for costs, and afterwards the sheriff was sued by him for the fruits of the execution and for the return to the writ, while the plaintiff in the original action claimed the money in the sheriff's hands to satisfy, *quantum sufficiat*, a judgment debt he had against the defendant. Held, that the plaintiff was simply the creditor of defendant for a different amount in a different matter, and that the interpleader would not lie). So far as the decision depended upon the difference in the amounts this case is no longer law (see p. 583, *ante*).

(*s*) *Salmon* v. *James* (1832), 1 Dowl. 369 (where during the time the sheriff was already in possession for one execution creditor he received other writs and notice that the first execution creditor was not entitled to all the goods); *Day* v. *Waldock*, *Lawrence* v. *Same* (1833), 1 Dowl. 523 (where the question was as to which of two writs the sheriff ought to have first seized under); see *Bowyer* v. *Pritchard* (1822), 11 Price 103; *Blennerhassett* v. *Scanlan* (1826), 2 Mol. 539.

(*a*) *Slowman* v. *Back* (1832), 3 B. & Ad. 103.

(*b*) The words quoted are those of R. S. C., Ord. 57, r. 1 (b), and are taken from the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*), under which it was held that where the sheriff went with the intention of levying, and was met by a claim, he might, in many cases, be justified in coming to the court for relief before he put himself in peril by an actual seizure, which might subject him not only to an action for the value of the goods, but also to damages for taking them (*Day* v. *Carr* (1852), 7 Exch. 883, *per* POLLOCK, C.B., at p. 886). In *Lea* v. *Rossi* (1855), 11 Exch. 13, the court considered that where the facts showed an intention to seize, the court might exercise its power, but that, as a rule, its exercise would be limited to cases in which great injustice would be done if the sheriff were not allowed to interplead before actual seizure.

(*c*) R. S. C., Ord. 57, r. 1 (b).

(*d*) *Allen* v. *Gibbon* (1833), 2 Dowl. 292.

(*e*) R. S. C., Ord. 57, r. 1 (b).

(*f*) *Smith* v. *Critchfield* (1885), 14 Q. B. D. 873, C. A.

SECT. 1. Cases in which Relief may be given.

(xi.) *Sheriff not compelled to Interplead.*

Sheriff may withdraw and need not interplead.

1175. A sheriff is not obliged to interplead where an adverse claim made to the goods seized is disputed by the execution creditor. Thus where the sheriff seized goods, and, upon a third person claiming them under a bill of sale, withdrew from possession, although, had the goods been sold, they would have realised more than sufficient to pay the claimant, it was held that the sheriff was entitled to withdraw, and was not compelled to interplead, and that the statute (*g*), which gave a power of sale to the court, had not made any difference in the sheriff's duties in this respect (*h*).

SECT. 2.—*Conditions of Relief.*

SUB-SECT. 1.—*No Interest.*

In general.

1176. Certain conditions precedent have been attached to the granting of relief to an applicant, whether stakeholder or sheriff.

The applicant must satisfy the court that he has no personal interest in the matter in dispute other than for charges or costs (*i*), that he is in a real position of impartiality between the claimants (*k*), and that he is in a position and willing to dispose of the subject-matter of the dispute as the court may direct.

Absence of personal interest except for charges or costs.

1177. The former condition was at one time successfully pleaded against an applicant who was liable as the maker of a promissory note, on the ground that it was a matter of interest to him to know to whom he was to pay over the money (*l*). So, also, it was said that where the applicant had entered into a contract with one of the claimants, or claimed in respect of a lien, he was interested in the subject-matter of the suit (*m*). At a later period, however, relief was allowed, although the applicant had a lien for freight and storage, or warehouse charges or commission, on the subject-matter in dispute (*n*), or was agent to or bailiff of one of the claimants (*o*).

To bar an applicant at the present day he must have in some way

(*g*) Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 12 (repealed and replaced now by R. S. C., Ord. 57, r. 12).

(*h*) *Scarlett* v. *Hanson* (1883), 12 Q. B. D. 213, C. A.; see *London and Bristol Mercantile Banking Co.* v. *Phillips* (1907), *Times*, 21st December, where it was held that the sheriff was not bound by the expression of his intention to interplead.

(*i*) R. S. C., Ord. 57, r. 2 (a); *Mitchell* v. *Hayne* (1824), 2 Sim. & St. 63; *Moore* v. *Usher* (1835), 7 Sim. 383.

(*k*) R. S. C., Ord. 57, r. 2. As to the filing of an affidavit by the defendant in answer to that of the plaintiff, see *Manby* v. *Robinson* (1869), 20 L. T. 385, C. A.

(*l*) *Newton* v. *Moody* (1839), 7 Dowl. 582.

(*m*) *Baker* v. *Bank of Australia* (1857), 1 C. B. (N. S.) 515; *Braddick* v. *Smith* (1832), 9 Bing. 84; *Crawshay* v. *Thornton* (1837), 2 My. & Cr. 1; and see p. 583, *ante*.

(*n*) *Cotter* v. *Bank of England* (1834), 2 Dowl. 728; *Harwood* v. *Betham* (1832), 1 L. J. (EX.) 180; *Attenborough* v. *St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, C. A.; *Best* v. *Hayes* (1863), 1 H. & C. 718, overruling *Mitchell* v. *Hayne*, *supra*; see *Yates* v. *Farebrother* (1819), 4 Madd. 239.

(*o*) See p. 583, *ante*.

identified himself with one of the claimants in the sense that it makes a difference to him which party succeeds, although he will not be refused relief merely because he has a natural affinity for one side rather than the other. Where the applicant has taken an indemnity from one of the claimants (*p*), or where he has entered into an agreement with one of them, the effect of which is that he will have to pay over less if that party succeeds (*q*), he has by his interested conduct precluded himself from obtaining relief by way of interpleader. The objection that the applicant has taken an indemnity from a claimant cannot, however, be raised by that claimant (*r*).

It is a matter of common practice for the costs and charges of an applicant, whether sheriff or stakeholder, to be payable out of and be made a first charge upon the subject-matter of the dispute (*s*).

SUB-SECT. 2.—*No Collusion.*

Meaning of "collusion."

1178. The second condition is that the applicant does not collude with any of the claimants (*t*). It is difficult to draw a clear line between interest and collusion. The terms are frequently used together, and the definition of collusion, now accepted and followed, is one which necessarily implies some identification of the interests of the applicant and a claimant. "Collusion" as used in the rule does not necessarily imply anything morally wrong. It means playing the same game as one of the parties (*a*). Therefore, where the applicant has bound himself with one of the parties to do whatever he properly can to defeat the claim of the other, he is colluding with that party (*b*). The trial between the two claimants is thus no longer a contest between two claimants, whom the applicant leaves to fight out their disputes, but it is a contest in which one of those combatants has the weight, interest, and influence of the applicant himself (*c*).

Where the applicant has placed himself in the position of being sued at the request, and with a view to the interest, of one of the claimants, he is colluding with him within the meaning of the rule, though not in any offensive sense of the word (*d*).

(*p*) *Tucker* v. *Morris* (1832), 1 Dowl. 639; compare *Gladstone* v. *White* (1836), 1 Hodg. 386; *Thompson* v. *Wright* (1884), 13 Q. B. D. 632; the *dictum* of WILLIAMS, J., at p. 634, *ibid.*, as to the rule relating to collusion is not now good. There are old cases in which it was held that the sheriff was entitled to interplead notwithstanding that he had asked for or had refused an indemnity (*Levy* v. *Champneys* (1834), 2 Dowl. 454; see also *Crossly* v. *Ebers* (1835), 1 Har. & W. 216; *Harrison* v. *Forster* (1836), 4 Dowl. 558; *Elliston* v. *Berryman* (1850), 15 Q. B. 205; *Quinton* v. *Butt* (1860), 5 Ir. Jur. (N. S.) 130).

(*q*) *Murietta* v. *South American etc. Co., Ltd.* (1893), 62 L. J. (Q. B.) 396, 397, 398.

(*r*) *Thompson* v. *Wright, supra;* see also cases cited in notes (*k*), (*l*), p. 590, *ante*.

(*s*) See *Attenborough* v. *St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, C. A., *per* BRETT, L.J., at p. 466; and see p. 621, *post*.

(*t*) R. S. C., Ord. 57, r. 2 (b).

(*a*) *Murietta* v. *South American etc. Co., Ltd., supra, per* WILLS, J., at p. 397, and *per* CHARLES, J., at p. 398.

(*b*) *Ibid.*

(*c*) *Ibid., per* CHARLES, J., at p. 398.

(*d*) *Belcher* v. *John Smith* (1832), 9 Bing. 82. See also *Nelson* v. *Barter* (1864),

SECT. 2. **Conditions of Relief.**

SUB-SECT. 3.—*Willingness and Ability to dispose of Subject-matter as Court directs.*

Applicant must be willing and able to bring subject-matter into court.

1179. The third condition in the granting of relief is that the applicant is willing and able to pay or transfer the subject-matter of the dispute into court, or to dispose thereof as the court or a judge may direct (*e*).

Rule in equity.

It was always a condition in the granting of relief in equity that the plaintiff to a bill of interpleader should bring the subject-matter of the dispute into court. It was not necessary to offer in the bill to pay it in, but before any step was taken in the cause the subject-matter had to be brought into court (*f*), unless the court ordered otherwise (*g*).

Where the subject-matter of the dispute is a chose in action, its disposition as the court directs is equivalent to payment in the case of money, or transfer in the case of goods or chattels, to which that process is applicable (*h*).

Whole amount must be brought in.

1180. It is generally necessary that a stakeholder applicant should be able to bring the whole amount into court, and it is no excuse that the applicant, before the adverse claim was made, paid a part of the sum claimed to the other claimant (*i*).

Practice in sheriff's interpleader.

1181. A sheriff is usually ordered to sell the goods seized and pay the proceeds into court unless the claimant pays their value into court or gives security for that amount. But where the proceedings are transferred to the county court (*k*), the sheriff is often directed to remain in possession of the goods subject to any order made in the county court after the transfer. A sheriff is never directed to bring the goods into court.

SUB-SECT. 4.—*Evidence as to Fulfilment of Conditions.*

Sheriff need not make an affidavit.

1182. As a rule an affidavit is sufficient evidence, but other evidence may be required (*l*).

Though the rule requiring evidence seems to apply in terms to a sheriff (*m*), it is not necessary for him, as a general rule, to

10 Jur. (N. S.) 832 (where the court thought that there might be facts which, though it could not inquire into them, would have shown that the applicant had not defended an action properly, and might have established such a case of collusion as to disentitle him to relief). As to collusion by the sheriff with claimant where the under-sheriff defeats or delays process in the interest of other parties, see p. 590, *ante*.

(*e*) R. S. C., Ord. 57, r 2 (c). The affidavit in support of the application in the case of a stakeholder applicant should state the specific sum or goods in his hands which are the subject of the adverse claims (*Butler* v. —— (1834), 3 L. J. (C. P.) 62).

(*f*) See *Meux* v. *Bell* (1833), 6 Sim. 175.

(*g*) *Powell* v. *Sonnet* (1826), 3 Russ. 556 (where the court ordered the money brought in by the plaintiff to the bill to be paid to a person who had authority from the defendants to receive it).

(*h*) *Robinson* v. *Jenkins* (1890), 24 Q. B. D. 275, C. A., *per* FRY, L.J., at p. 279.

(*i*) *Allen* v. *Gilby* (1834), 3 Dowl. 143.

(*k*) See p. 607, *post*.

(*l*) R. S. C., Ord. 57, r. 2.

(*m*) *Ibid.*

support his application by an affidavit denying any interest or collusion, and where he does file such an affidavit the costs thereof may be disallowed (*n*). His proper course is to wait to see if, owing to exceptional circumstances, the court requires such an affidavit (*o*).

Affidavit must as a general rule be made by applicant himself.

1183. In applications for relief by persons other than sheriffs, the affidavit should, as a rule, be made by the applicant himself (*p*): an affidavit by his solicitor may be held insufficient (*q*).

An applicant resident abroad was, however, allowed to file a bill in equity upon an affidavit by his solicitor, subject to the right of the defendants to demur on the ground of insufficiency (*r*); and where several applicants were resident in different parts of the country, a bill was allowed to be filed upon affidavit of the solicitor, but only upon the understanding that the applicants themselves would make affidavits as soon as possible (*a*).

Rule where applicant a company.

1184. Where the applicant is an officer of a company, authorised by Act of Parliament to sue in his own name, the officer must state not only that he himself has no interest and does not collude, but also that, to the best of his knowledge and belief, the company has no interest and is not in collusion with the claimants (*b*). Where the applicant was a railway company, an affidavit made by its solicitor who had had the conduct of the transactions which led to the litigation was held sufficient though, strictly speaking, it ought perhaps to have been made by the secretary of the company (*c*). Where the applicants were a firm, an affidavit by two out of the four partners was allowed (*d*).

SECT. 3.—*The Claim.*

SUB-SECT. 1.—*Who may be Claimants.*

(i.) *In General.*

Instances of claimants.

1185. Any person may be a claimant who is in a position to maintain an action (*e*). Thus, there are instances of claims by infants (*f*), married women (*g*), *cestuis que trustent*, though the

(*n*) *Stocker* v. *Heggerty* (1892), 67 L. T. 27.

(*o*) *Ibid.* Under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*) it was held that an affidavit by the sheriff was unnecessary, as the Act in terms limited its necessity to other applicants for relief (*Donniger* v. *Hinxman* (1833), 2 Dowl. 424; *Dobbins* v. *Green* (1834), 2 Dowl. 509; *Bond* v. *Woodhall* (1835), 4 Dowl. 351).

(*p*) *Powell* v. *Lock* (1835), 3 Ad. & El. 315 (affidavit by claimant himself necessary).

(*q*) *Wood* v. *Lyne* (1850), 4 De G. & Sm. 16; see, however, *Webster* v. *Delafield* (1849), 7 C. B. 187, 198, 200; *Plues* v. *Capel* (1880), 68 L. T. Jo. 354 (affidavits of applicant's solicitors admitted).

(*r*) *Larabrie* v. *Brown* (1857), 1 De G. & J. 204.

(*a*) *Nelson* v. *Barter* (1864), 2 Hem. & M. 334.

(*b*) *Bignold* v. *Audland* (1840), 11 Sim. 23.

(*c*) *Great Southern and Western Rail. Co.* v. *Corry* (1867), 1 I. R. Eq. 225.

(*d*) *Glover* v. *Reynolds* (1867), 16 L. T. 84.

(*e*) See generally title ACTION, Vol. I., pp. 17 *et seq.*

(*f*) *Claridge* v. *Collins* (1839), 7 Dowl. 698; and see title INFANTS AND CHILDREN, pp. 133 *et seq.*, *ante*.

(*g*) *Bird* v. *Crabb, Shingler* v. *Holt* (1861), 7 Jur. (N. S.) 866; and see title HUSBAND AND WIFE, Vol. XVI., p. 453.

SECT. 3. The Claim.

trustees were not joined (*h*), administrators, executors, or trustees of a settlement (*i*), a person claiming a lien on the subject-matter in dispute (*k*), an agent who had leased goods to the execution debtor (*l*), a liquidator of a foreign company (*m*), the representatives in bankruptcy of the debtor (*n*), a trustee under a deed of assignment for the benefit of creditors (*o*), debenture-holders, where the property seized was the property of the company (*p*), a receiver appointed by the court (*q*), and an equitable mortgagee (*r*).

The execution debtor may be a claimant where he claims as executor or trustee for some other person, and not in his own right (*s*).

(ii.) *The Crown.*

Whether interpleader lies if Crown a claimant.

1186. Where a claim was made on behalf of the Crown, adverse to that of another claimant, the stakeholder was in equity entitled to file a bill of interpleader making the Crown one of the defendants to the bill, since the Crown necessitated the proceedings by contesting the applicant's right to pay the other claimants (*t*). In an earlier case the common law courts refused relief where the Crown was claimant, on the ground, it seems, that the Crown could not be a party under the Interpleader Act (*u*), as an order for costs might have to be made, and such an order is never made against the Crown (*v*). Costs are, however, now frequently given against the Crown, and this objection would probably not be sufficient at the present day to bar an applicant from obtaining relief in a proper case (*a*).

(iii.) *Parties out of the Jurisdiction.*

Residence out of jurisdiction no bar to relief.

1187. In the cases in which the court has jurisdiction to order service of a writ out of the jurisdiction (*b*) it may order service of

(*h*) *Schroeder* v. *Hanrott* (1873), 28 L. T. 704.

(*i*) *Bradley* v. *James* (1876), 10 I. R. C. L. 441; *Fenwick* v. *Laycock* (1841), 2 Q. B. 108; *Burke* v. *Routledge* (1851), 3 Ir. Jur. 148; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 330.

(*k*) *Ford* v. *Baynton* (1832), 1 Dowl. 357; *Rogers* v. *Kennay* (1846), 9 Q. B. 592; *Jones* v. *Turnbull* (1837), 2 M. & W. 601.

(*l*) *Green* v. *Stevens* (1857), 2 H. & N. 146.

(*m*) *Levasseur* v. *Mason and Barry*, [1891] 2 Q. B. 73, C. A.

(*n*) *Jones* v. *Turnbull, supra; Bradley* v. *James, supra; Bird* v. *Mathews* (1882), 46 L. T. 512, C. A.; *Dibb* v. *Brooke & Sons*, [1894] 2 Q. B. 338.

(*o*) *Adnitt* v. *Hands* (1887), 57 L. T. 370.

(*p*) *Davey & Co.* v. *Williamson & Sons*, [1898] 2 Q. B. 194.

(*q*) *Purkiss* v. *Holland* (1887), 31 Sol. Jo. 702, C. A.

(*r*) *Usher* v. *Martin* (1889), 24 Q. B. D. 272.

(*s*) *Fenwick* v. *Laycock, supra.*

(*t*) *Reid* v. *Stearn* (1860), 6 Jur. (N. S.), 267.

(*u*) Stat. (1831) 1 & 2 Will. 4, c. 58.

(*v*) *Candy and Dean* v. *Maugham* (1843), 1 Dow. & L. 745; and see titles ACTION, Vol. I., p. 17; CONSTITUTIONAL LAW, Vol. VI., p. 412.

(*a*) For a contrary opinion, see Robertson, Civil Proceedings by and against the Crown, p. 610.

(*b*) See *Re Aktiebolaget Robertsfors and La Société Anonyme des Papeteries de l'Aa*, [1910] 2 K. B. 727.

any summons, including an interpleader summons or notice, on any party or person residing out of the jurisdiction (*c*).

(iv.) *Several Claimants.*

Relief may be given though there are several claimants.

1188. The fact that there are several claimants is no bar to relief being granted, the principle being that an applicant ought to be relieved from the vexation attending the bringing of various suits against him (*d*); nor is it an objection that all the claimants do not claim precisely the same amount (*e*). Moreover, the court has power, in a proper case, to substitute one claimant for another (*f*), or to add a claimant (*g*).

SUB-SECT. 2.—*Requirements as to the Claim.*

(i.) *Necessity of Writing.*

How claim must be made.

1189. Where a claim is made to or in respect of any goods or chattels taken in execution under the process of the court, it must be in writing (*h*). The wording of the rule is somewhat indefinite, as no provision is made where the claim is to money or to the proceeds or value of the goods or chattels seized. It is submitted that in these cases also the claim should be in writing.

No similar provision has been made where the applicant is a stakeholder.

(ii.) *Particulars.*

Nature and particulars of claim must be accurately given.

1190. The nature and particulars of every claim must be stated with such a degree of precision and certainty as to enable the execution creditor or opposing claimant to determine whether or not he will persist in his claim, and to enable the court to form an opinion as to what order it ought to make (*i*). If interpleader proceedings are commenced the claimant must be prepared with an affidavit in

(*c*) R. S. C., Ord. 11., r. 8A (August, 1909). See also *Attenborough* v. *St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, 454, C. A.; *Stevenson* v. *Anderson* (1814), 2 Ves. & B. 407, 411; *East and West India Dock Co.* v. *Littledale* (1848), 7 Hare, 57; *Van der Kan Deitizsman* v. *Ashworth & Co.*, [1884] W. N. 58; *Credits Gerundeuse* v. *Van Weede* (1884), 12 Q. B. D. 171; *City of Dublin Steam Packet Co.* v. *Cooper*, [1899] 2 I. R. 381; *Henry & Co.* v. *Engley* (1907), July, C. A., not reported. Residence out of the jurisdiction was formerly a bar to relief, as there was no power to serve an originating summons out of the jurisdiction (*Patorni* v. *Campbell* (1843), 1 Dow. & L. 397). As to when service out of the jurisdiction may be ordered, see title PRACTICE AND PROCEDURE.

(*d*) *Angell* v. *Hadden* (1808), 15 Ves. 244; *Farebrother* v. *Beale* (1849), 3 De G. & Sm. 637 (where it was held that where the will set up a case for delay as between two of the defendants, but also set up the claim of a third, which was paramount to the claims of the two others, it could not be demurred to).

(*e*) *Hoggart* v. *Cutts* (1841), Cr. & Ph. 197; *Carr* v. *Edwards* (1839), 8 Dowl. 29; and see p. 583, *ante*.

(*f*) *Ibbotson* v. *Chandler* (1841), 9 Dowl. 250 (assignees in bankruptcy substituted for provisional assignee); *Lydal* v. *Biddle* (1836), 5 Dowl. 244.

(*g*) *Bird* v. *Mathews* (1882), 46 L. T. 512, C. A. (trustee in bankruptcy); *Kirk* v. *Clark* (1835), 4 Dowl. 363; *Walker* v. *Ker* (1843), 12 L. J. (EX.) 204.

(*h*) R. S. C., Ord. 57, r. 16.

(*i*) *Powell* v. *Lock* (1835), 3 Ad. & El. 315; *Webster* v. *Delafield* (1849), 7 C. B. 187, 198, 200.

SECT. 3. The Claim.

support showing the nature of and giving particulars of his claim (*j*), and he may be bound by the particulars given therein (*k*).

A claimant cannot call upon the sheriff to deliver particulars of the goods seized in order to enable him to prepare his claim (*l*).

No affidavit is required from the execution creditor as to the nature and particulars of his claim (*m*).

(iii.) *Withdrawal.*

Where claimant desires to withdraw his claim.

1191. A claimant who wishes to withdraw his claim must do so by notice in writing to the sheriff or his officer (*n*). If he withdraws after the issue of the interpleader summons, but before its return, the court may make such orders as to costs, fees, charges and expenses as appear just and reasonable (*o*). If he withdraws before the issue of the summons, he is apparently not liable for any costs (*p*).

SECT. 4.—*The Application.*

SUB-SECT. 1.—*Mode of Applying.*

Application for relief.

1192. A stakeholder applies for relief by taking out an originating summons (*q*), unless he has already been sued, in which case he may issue an ordinary summons (*r*) in the action. If he be a debtor with notice of the assignment of the debt and with notice that the assignment is disputed or of any opposing or conflicting claim, he may apply by originating summons (*s*).

Practice.

The originating summons is returnable before a master (*t*), and a formal appearance need not be entered (*u*).

In London.

In London an originating summons in the Chancery Division is issued at the Writ Department of the Central Office, and in the King's Bench Division at the Summons and Order Department of that office. When the application is by an ordinary summons taken out by a defendant in an action in the Chancery Division, the summons is issued in the chambers of the judge to whom the

(*j*) R. S. C., Ord. 57, r. 5; *Powell* v. *Lock* (1835), 3 Ad. & El. 315. The affidavit should be intituled in the original action where the applicant is a defendant or sheriff (*Pariente* v. *Pennell* (1844), 7 Scott (N. R.), 834; *Levi* v. *Coyle* (1843), 7 Jur. 725).

(*k*) *Hockey* v. *Evans* (1887), 18 Q. B. D. 390, C. A. (where the affidavit filed in support of a claim under a bill of sale alleged that there was due to the claimant a specific sum and interest at the rate specified in the bill. Held, that the claimant could not, after a sale had been ordered, recover from the sheriff a further sum for costs and charges, even though it was recoverable, as against the mortgagor, under the bill).

(*l*) *Bauly* v. *Krook* (1891), 65 L. T. 377.

(*m*) *Angus* v. *Wootton* (1838), 3 M. & W. 310.

(*n*) R. S. C., Ord. 57, r. 17.

(*o*) *Ibid.*

(*p*) See R. S. C., Ord. 57, r. 16.

(*q*) Fee, 10*s*. See also title PRACTICE AND PROCEDURE.

(*r*) Fee, 3*s*.

(*s*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); see p. 584, *ante*. In such a case the court has no power to stay the action, as the application is not an application in the action (*Reading* v. *London School Board* (1886), 16 Q. B. D. 686).

(*t*) See title COURTS, Vol. IX., pp. 66, 67.

(*u*) R. S. C., Ord. 54, r. 4F.

action is assigned, and, if in an action in the King's Bench Division, in the Summons and Order Department of the Central Office.

If the applicant be a defendant to an action proceeding in a district registry (*v*), the summons must be issued there, returnable before the district registrar, but, except in Manchester and Liverpool, an interpleader originating summons cannot be issued out of a district registry, and a stakeholder who has not been sued is therefore compelled to apply for relief in London (*w*).

In a district registry.

A sheriff applies for relief by taking out an ordinary summons in the action in which the process has been issued, in the chambers of the judge of the Chancery Division to whom the action has been assigned, or in the Summons and Order Department of the Central Office, or in the district registry, as the case may be.

Application by sheriff.

SUB-SECT. 2.—*Time.*

1193. A stakeholder who has actually been sued may make his application immediately after service of the writ (*a*). Whether he has been sued or not, he must make it with due diligence, after knowledge of the adverse claims, and at the peril of being refused relief altogether, or of being mulcted in costs if there has been undue delay. In ordinary cases it is too late to apply after judgment in the action, even though judgment is signed in default (*b*); but where the effect of an action at law was merely to ascertain the *quantum* of demand, the defendant could still obtain relief by bill in equity upon the amount ascertained by the action being claimed by other parties than the plaintiff at law (*c*).

Stakeholder's interpleader.

Where the applicant, knowing of the adverse claims, allowed himself to be sued by one of the parties, and advised the joinder in the action of the other claimant, instead of resorting to interpleader proceedings, it was held that he had forfeited the usual privilege allowed to an applicant in interpleader of getting his costs, and that he must pay the costs of the successful claimant (*d*).

1194. A sheriff or his officer, upon receipt of a claim, must forthwith (*e*) give notice thereof (*f*) to the execution creditor, who within

In sheriff's interpleader.

(*v*) See title COURTS, Vol. IX., pp. 69, 70.

(*w*) See Yearly Practice of the Supreme Court, 1911, p. 853.

(*a*) Under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*) it was to be made after the declaration but before the plea. Where the defendant twice obtained time to plead it was held that the application was not too late (*Barnes* v. *Bank of England* (1833), 1 Will. Woll. & H. 50).

(*b*) *Cornish* v. *Tanner* (1827), 1 Y. & J. 333; *Larabrie* v. *Brown* (1857), 1 De G. & J. 204, C. A.

(*c*) *Hamilton* v. *Marks* (1852), 5 De G. & Sm. 638.

(*d*) *Crickmore* v. *Freeston* (1870), 40 L. J. (CH.) 137.

(*e*) This means at the earliest time which is reasonably possible in the circumstances.

(*f*) The notice should be given to the execution creditor, not to his solicitor, since the latter has no authority under an ordinary retainer (as to which see title SOLICITORS) to engage in interpleader proceedings without further instructions from his client (*James* v. *Ricknell* (1887), 20 Q. B. D. 164; compare *De la Pole* (*Lady*) v. *Dick* (1885), 29 Ch. D. 351, C. A.; *Austin* v. *Macnamara & Co.* (1895), 40 Sol. Jo. 71, C. A., as to retainer extending to an appeal; and see *Callow* v. *Young* (1886), 55 L. T. 543). The notice must specify the goods claimed, unless

SECT. 4. The Application.

four days of its receipt must give notice (*g*) to the sheriff or his officer that he admits or disputes the claim. If within that time no such notice is given to the sheriff by the execution creditor disputing the claim, and the claimant has not withdrawn, the sheriff may apply for relief (*h*). He, therefore, may not interplead till after receipt of notice by the execution creditor disputing the claim or until after the expiration of four days from the receipt by the execution creditor of the sheriff's notice (*i*). But after that time he must apply as soon as possible, as any delay causes additional expense, which may inflict great hardships upon the parties (*k*).

Time.

No fixed rule.

There is no fixed rule as to the time for making the application, except that the sheriff must apply promptly and within such time as in the circumstances of the case the court thinks reasonable (*l*).

SUB-SECT. 3.—*Service of Summons.*

Practice.

1195. The summons must be served upon the execution creditor and the claimants two clear days before its return day. If the application is made by an originating summons, there being no action pending, personal service is necessary (*m*). If the application is by a summons in the action, so far as the plaintiff or execution creditor is concerned, service may be effected upon the party's solicitor if he has one (*n*), or if not, then by leaving a copy at the address for service with a person resident at or belonging to such place, or by posting it in a prepaid registered envelope addressed to the person

all those seized are claimed, and calls upon the execution creditor to admit or dispute the claimant's title thereto within four days after receipt of such notice, and reminds the execution creditor that if he admits the claim, and gives the notice of such admission within such time, he is liable only for fees and expenses incurred prior to its receipt by the sheriff (R. S. C., Appendix B, No. 28). The giving of the notice is a condition precedent to the sheriff's application (*Dalton* v. *Furness* (1866), 35 Beav. 461).

(*g*) For form, see R. S. C., Appendix B, No. 29.

(*h*) R. S. C., Ord. 57, rr. 16, 17. As to notice admitting the claim, see p. 589, *ante*.

(*i*) *Isaac* v. *Spilsbury* (1833), 2 Dowl. 211.

(*k*) *Cook* v. *Allen* (1833), 2 Dowl. 11; *Tufton* v. *Harding* (1859), 6 Jur. (N. S.) 116.

(*l*) He need not wait till proceedings are taken against him (*Green* v. *Brown* (1835), 3 Dowl. 337). Under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*) there were many decisions laying down the time within which a sheriff must make his application at the peril of being refused relief altogether (*Cook* v. *Allen, supra; Devereux* v. *John* (1833), 1 Dowl. 548 (possession kept for several months. Held too late to apply for relief); *Mutton* v. *Young* (1847), 4 C. B. 371 (five weeks interval too long)), or having to pay costs if guilty of laches (*Beale* v. *Overton* (1837), 5 Dowl. 599 (application two months after claim made)). Several of the decisions fixed the early part of the term following that in which the claim was made as the maximum of allowance to the sheriff (*Beale* v. *Overton, supra*). In *Ridgway* v. *Fisher* (1835), 3 Dowl. 567, where the claim was made on the 23rd January, it was held that the application ought to have been made in the Hilary term, and relief was refused. An interval of three weeks has been held too long (*Tufton* v. *Harding, supra*), and an interval of eleven days held early enough (*Skipper* v. *Lane* (1834), 2 Dowl. 784). Under special circumstances a late application was sometimes allowed (*Dixon* v. *Ensell* (1834), 2 Dowl. 621).

(*m* R. S. C., Ord. 54, rr. 4B, D, F (3).

(*n*) R. S. C., Ord. 67, r. 7.

to be served at the address for service (*o*). The other claimant, not having been a party to the prior proceedings, will not have given any address for service, and it would seem, therefore, that personal service is necessary unless waived (*p*).

Where a claimant has not appeared, and personal service has not been effected, an application for an order in favour of the execution creditor has been postponed to enable personal service to be effected (*q*). On the other hand, where the execution creditor has not appeared, an affidavit of service on his solicitor has been held sufficient (*r*).

SECT. 5.—*The Order.*

SUB-SECT. 1.—*In General.*

Ways of disposing of the interpleader summonses.

1196. Upon the return of the summons, if the parties appear, there are various courses open to the master (*s*). In deciding what he will do he is guided by the value of the subject-matter in dispute, and by the nature of the claims as set out in the affidavits. He may either dispose of the matter summarily (*t*), or direct an issue to be drawn up and tried (*u*), or order that a special case be stated for the opinion of the court (*a*), or order that the proceedings be removed to a county court (*b*), or, where the applicant is a defendant, direct that the action proceed but that the claimant be made a defendant in lieu of or in addition to the defendant (*c*). Where an order has been made upon an erroneous impression as to the facts, but has not been drawn up, the drawing up may be stayed and the matter reheard before making a final order (*d*).

SUB-SECT. 2.—*Non-Appearance of Parties.*

Power to bar claimant who does not appear.

1197. Where a claimant who has been served (*e*) with an interpleader summons fails to appear, an order may be made declaring him and all persons claiming under him for ever barred from relief against the applicant and persons claiming under him, but such an order does not affect the rights of the claimants as between themselves (*f*).

(*o*) R. S. C., Ord. 67, r. 2.

(*p*) *Ibid.*

(*q*) *Lambert* v. *Townsend* (1832), 1 L. J. (EX.) 113.

(*r*) *Phillips* v. *Spry* (1832), 1 L. J. (EX.) 115.

(*s*) This includes a district registrar where the proceedings are properly being carried on in a district registry. The words used in the rule are "the court or a judge." By R. S. C., Ord. 54, r. 12, a master has the same jurisdiction with regard to interpleader matters as a judge at chambers. "Court" means a judge or judges in open court, and "a judge" means a judge sitting at chambers (*Re B.* —— (*an alleged Lunatic*), [1892] 1 Ch. 459, 463, C. A.); see *Baker* v. *Oakes* (1877), 2 Q. B. D. 171, C. A.; *Walmsley* v. *Mundy* (1884), 13 Q. B. D. 807.

(*t*) R. S. C., Ord. 57, rr. 8, 9.

(*u*) *Ibid.*, r. 7; see p. 607, *post*.

(*a*) R. S. C., Ord. 57, r. 9; see p. 616, *post*.

(*b*) See p. 607, *post*.

(*c*) R. S. C., Ord. 57, r. 7; see p. 615, *post*.

(*d*) *Re Roberts, Evans* v. *Thomas*, [1887] W. N. 231. See title JUDGMENTS AND ORDERS.

(*e*) Service must be proved by affidavit before an order will be made (*Phillips* v. *Spry*, *supra*). As to service generally, see title PRACTICE AND PROCEDURE.

(*f*) R. S. C., Ord. 57, r. 10. This power existed before the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*). In *Hodges* v. *Smith*

SECT. 5. **The Order.**

1198. This rule applies whether the applicant is a stakeholder or sheriff, but it only applies to a claimant, and not to the execution creditor, in a sheriff's interpleader.

No power to bar execution creditor.

Under the Interpleader Act (*g*) there was no power to bar the claim of the execution creditor upon his non-appearance, but the court could order the sheriff to withdraw, and restrain the execution creditor from bringing an action against him (*h*).

Where execution creditor and claimant do not appear.

If neither the execution creditor nor the claimant appear, the proper order is that the sheriff shall sell so much of the goods as will pay his poundage, expenses, and costs, and abandon the execution, and that actions against him by either party shall be restrained (*i*).

Where parties do not appear in stakeholder's interpleader.

1199. In an interpleader by a defendant to an action, where the plaintiff in the action does not appear, the action may be stayed, and the plaintiff ordered to pay the costs. If the claimant does not appear, his claim against the applicant may be barred, and he may be ordered to pay the costs (*j*). If neither plaintiff nor claimant appear, the action may be stayed, and the court may make what order seems just with regard to the subject-matter, out of which the applicant will be allowed his costs.

SUB-SECT. 3.—*Stay of Proceedings.*

Where applicant for relief is a defendant to action already commenced.

1200. Where the applicant is a defendant to an action already commenced, and the court (*k*) decides to grant the application in one of the ways already mentioned, it will, as a rule, order that further proceedings in the action against the defendant be stayed pending the determination of the subject-matter of the dispute (*l*). But in order that this may be done the applicant must apply by summons taken out in the action. If he applies under the Judicature Act, 1873 (*m*), the court cannot stay the action, as the application is made in a separate proceeding and not in the action itself (*n*).

(1787), 1 Cox, Eq. Cas. 357, where one of the defendants to an interpleader bill did not appear, it was ordered that he should pay the costs of the plaintiff and the appearing defendant, and the injunction against him be made perpetual. For cases under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*), see *Ford* v. *Dilly* (1833), 5 B. & Ad. 885; *Lucas* v. *London Dock Co.* (1832), 4 B. & Ad. 378; *Bowdler* v. *Smith* (1832), 1 Dowl. 417. In *Williams* v. *Richardson* (1877), 36 L. T 505, where the claimants failed to appear and were barred, it was held that they could not set up as a defence to the action the facts by which they claimed to be entitled to the goods upon which the sheriff had levied; see further title ESTOPPEL, Vol. XIII., p. 358.

(*g*) Stat. (1831) 1 & 2 Will. 4, c. 58 (see note (*l*), p. 581, *ante*).

(*h*) *Donniger* v. *Hinxman* (1833), 2 Dowl. 424; *Doble* v. *Cummins* (1837), 7 Ad. & El. 580; but see *Lewis* v. *Jones* (1836), 2 M. & W. 203 (where the execution creditor was barred as against the claimant, and the court refused to restrain an action by the claimant against the sheriff or execution creditor). The order generally made is simply "sheriff to withdraw, no action" (see *Malone* v. *Ross*, [1900] 2 I. R. 586, C. A.).

(*i*) *Eveleigh* v. *Salsbury* (1836), 5 Dowl. 369.

(*j*) *Hansen* v. *Maddox* (1883), 12 Q. B. D. 100.

(*k*) As to the meaning of "court," see note (*s*), p. 601, *ante*.

(*l*) As to the issue of an interpleader summons or order preventing the issue of a bankruptcy notice, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 28.

(*m*) 36 & 37 Vict. c. 66, s. 25 (6); see p. 584, *ante*.

(*n*) *Reading* v. *London School Board* (1886), 16 Q. B. D. 686.

1201. Where a sheriff has issued an interpleader summons, an action commenced by the claimant, before the determination of the interpleader proceedings, for an injunction to restrain the sheriff from remaining in possession, is premature and irregular (*o*).

Where applicant for relief is a sheriff.

1202. Where the applicant is a sheriff, the court, in making an order either to bar the claimant or for the sheriff to withdraw, as a rule directs that no action shall be brought against the sheriff.

Usual order in sheriff's interpleader.

The court has power to stay an action by the claimant against the sheriff, not only for damages caused by the seizure of the goods, but also for trespass, provided no substantial injury has been done to the person whose premises have been wrongfully entered (*p*). The sheriff will be protected only where he has made an honest mistake in executing the process of the court, and where, but for such mistake, everything that he has done would have been justified by the writ (*q*). But where substantial grievance has been done to the person whose premises have been wrongfully entered, an action against the sheriff ought not to be barred (*r*), even though the seizure is *bonâ fide* and there has been no misconduct (*s*). *A fortiori*, where there has been misconduct the court will not protect the sheriff (*t*).

Power of court to restrain action against sheriff.

1203. The court has power also to restrain an action against the execution creditor (*u*). But where an action has been commenced before an order has been made upon the interpleader summons, and the solicitor for the execution creditor has given an undertaking to appear, and an order is subsequently made for the sheriff to withdraw and no action to be brought, the court cannot set aside the writ and undertaking, but can only stay the proceedings (*v*).

Power of court to restrain action against the execution creditor.

"No action" means, as a rule, no action against the sheriff (*w*).

"No action."

An execution creditor cannot be sued for a mistake on the part of the sheriff where he has not done anything to authorise the act of the sheriff, and his becoming a party to an issue is not such a ratification of the sheriff's act as to make him liable as the sheriff's principal (*a*).

Execution creditor not liable for mistake of sheriff.

(*o*) *Hilliard* v. *Hanson* (1882), 21 Ch. D. 69, C. A.; compare *Aylwin* v. *Evans* (1882), 52 L. J. (CH.) 105.

(*p*) *Winter* v. *Bartholomew* (1856), 11 Exch. 704, not following *Hollier* v. *Laurie* (1846), 3 C. B. 334; *Smith* v. *Critchfield* (1885), 14 Q. B. D. 873, C. A.

(*q*) *Winter* v. *Bartholomew*, *supra*, *per* ALDERSON, B., at p. 708; *Smith* v. *Critchfield*, *supra*, *per* BRETT, M.R., at p. 878; see *Salberg* v. *Morris* (1887), 4 T. L. R 47; and title EXECUTION, Vol. XIV., pp. 28, 29.

(*r*) *De Coppett* v. *Barnett* (1901), 17 T. L. R. 273, C. A., distinguishing *Smith* v. *Critchfield*, *supra*.

(*s*) *London, Chatham and Dover Rail. Co.* v. *Cable* (1899), 80 L. T. 119.

(*t*) *Winter* v. *Bartholomew*, *supra*.

(*u*) *Carpenter* v. *Pearce* (1858), 27 L. J. (EX.) 143.

(*v*) *Hooke* v. *Ind, Coope & Co.* (1877), 36 L. T. 467.

(*w*) *Ibid.*

(*a*) *Woollen* v. *Wright* (1862), 1 H. & C. 554, Ex. Ch., following *Wilson* v. *Tumman* (1843), 6 Man. & G. 236; *Whitmore* v. *Greene* (1844), 13 M. & W. 104. See also *Smith* v. *Keal* (1882), 9 Q. B. D. 340, C. A.; *Clissold* v. *Cratchley*, [1910] 2 K. B. 244, C. A.; and title EXECUTION, Vol. XIV., p. 20.

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Abandonment by the execution creditor.

1204. Where the execution creditor abandons the seizure, and the court (*b*) has refused an order to bar an action against the sheriff, the sheriff may still show, if he can, that the goods really belonged to the execution debtor (*c*).

SUB-SECT. 4.—*Sale.*

Power of court.

1205. In a sheriff's interpleader the court has power to order a sale of the whole or a part of the goods seized by the sheriff, and payment into court of the proceeds, after deducting the sheriff's costs and expenses. This is generally done where the claimant fails to pay their value into court or to give security (*d*).

Where claimant claims under a bill of sale.

1206. Where goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for a debt, the court or a judge may order the sale of the whole or a part thereof, and devote the application of the proceeds of the sale in such manner and upon such terms as may be just (*e*).

Power may be exercised whenever it appears to the court just and reasonable.

1207. The power of the court to order a sale is not, however, confined to this rule. Its power is discretionary, and may be exercised whenever it appears just and reasonable (*f*). It may exercise the power when the claimant claims under an absolute bill of sale (*g*), or it may refrain from doing so and order the appointment of a receiver and manager where a sale might do great injury (*h*).

It has been said that under the rule three cases arise in practice (*i*).

(*b*) As to meaning of "court," see note (*s*), p. 601, *ante*.

(*c*) *Baynton* v. *Harvey* (1835), 3 Dowl. 344.

(*d*) Where, however, it would appear unjust to order a sale, or security be not given, the court may vary the usual practice; see *Victor* v. *Cropper* (1886), 3 T. L. R. 110, C. A. To some extent this power existed under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*) (see *Abbott* v. *Richards* (1846), 15 M. & W. 194, 197; *Paquin, Ltd.* v. *Robinson* (1901), 85 L. T. 5, C. A.), but under that Act it was held that the court could not exercise its power where a claimant alleged that he was entitled to the goods by way of security under a bill of sale, and if a claimant established a title to goods of however great value, by way of security for however small a sum, the execution creditor was defeated absolutely, as the court had no power to provide for realisation of the security and disposal of the surplus, or for payment of the debt and discharge of the security by the execution creditor. To remedy this the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 13, was framed, which put an end to a convenient and much used scheme for defeating creditors (*Stern* v. *Tegner*, [1898] 1 Q. B. 37, C. A., *per* LINDLEY, M.R., quoting from Day on the Common Law Procedure Acts, 4th ed., p. 361). This provision is embodied in the Rules of the Supreme Court, 1883, Ord. 57, r. 12.

(*e*) R. S. C., Ord. 57, r. 12; and see title EXECUTION, Vol. XIV., pp. 52 *et seq.*

(*f*) R. S. C., Ord. 57, r. 15; *Paquin, Ltd.* v. *Robinson*, *supra*.

(*g*) *Ibid.*

(*h*) *Howell* v. *Dawson* (1884), 13 Q. B. D. 67 (where the court ordered the appointment of a receiver and manager at the expense of the claimant, but ordered that if the claimant succeeded on the issue, such expense should be paid by the execution creditor).

(*i*) *Stern* v. *Tegner*, *supra*, *per* LINDLEY, M.R., at p. 41.

First, where the security is ample and the bill of sale holder asserts his rights so as to defeat the execution creditor. In such case a sale will, as a rule, be ordered (*k*).

Secondly, where the security is clearly insufficient. If in such case a sale were ordered, there be would no surplus, and the proper course is, therefore, to direct the sheriff to withdraw (*l*).

Thirdly, where it is doubtful whether the security is sufficient to pay off the execution creditor, the court ought not to order a sale unless the execution creditor will guarantee the secured creditor against loss (*m*).

The power given by the rule to direct the application of the proceeds of the sale in such manner and upon such terms as may be just enables the court to limit the payment of interest to the bill of sale holder out of the proceeds up to the time of payment only, and so to interfere with the contract for payment of interest for the whole time covered by the bill (*n*).

Where bankruptcy supervenes.

1208. Where an order has been made under the above rule directing the sheriff to sell, and a claim is made by the trustee in bankruptcy of the judgment debtor, the sheriff must comply with the requirements of the Bankruptcy Acts (*o*) where they apply, and hand over the goods if unsold, or their proceeds if sold, to the official receiver or trustee (*p*). If the official receiver asks for delivery of the goods the operation of the rule is probably suspended (*q*), but if he concurs in asking for a sale there is jurisdiction to make an order to that effect, but a sale ought not to be ordered without a guarantee from the execution creditor against loss arising from an insufficiency of the proceeds to meet what is due under the bill. If no guarantee is forthcoming the sheriff ought to be ordered to withdraw (*a*).

Disposal of proceeds of sale.

1209. If no order is made directing the application of the proceeds of the sale in the sheriff's hands, he is not bound to pay it over, but may retain the amount until he obtains an order to relieve him of his responsibility, and until then an action will not

(*k*) *Pearce* v. *Watkins* (1861), 2 F. & F. 377. This is the case which the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 13 (now embodied in R. S. C., Ord. 57, r. 12), was passed to meet; see note (*d*), p. 604, *ante*. The sheriff, however, cannot be compelled to interplead in such a case (*Scarlett* v. *Hanson* (1883), 12 Q. B. D. 213, C. A.).

(*l*) *Pearce* v. *Watkins*, *supra*; *Stern* v. *Tegner*, [1898] 1 Q. B. 37, C. A.

(*m*) *Stern* v. *Tegner*, *supra* (where the court ordered the sheriff to withdraw, as the execution creditor refused to give a guarantee against loss).

(*n*) *Forster* v. *Clowser*, [1897] 2 Q. B. 362, C. A. (RIGBY, L.J., dissenting and holding that the judge's power was limited by the practice of the courts of equity in suits for redemption); *West* v. *Diprose*, [1900] 1 Ch. 337, 340.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 45, 46, as altered by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 274.

(*p*) *Heathcote* v. *Livesley* (1887), 19 Q. B. D. 285; *Re Harrison, Ex parte Essex (Sheriff)*, [1893] 2 Q. B. 111; and see title EXECUTION, Vol. XIV., pp. 34, 36.

(*q*) *Stern* v. *Tegner*, *supra*, *per* LINDLEY, L.J., at p. 41.

(*a*) *Stern* v. *Tegner*, *supra*.

SECT. 5. The Order.

lie by the successful party to the issue against the sheriff for money had and received to his use (*b*).

Damages.

1210. Neither the sheriff nor the execution creditor is liable to a claimant for damages sustained by him in consequence of a sale properly conducted under an interpleader order (*c*).

SUB-SECT. 5.—*Summary Decision.*

Power of master.

1211. Where the facts are in dispute and all the claimants consent, or one of the claimants requests him so to do, the master (*d*) may summarily dispose of the claims on such terms as may be just if that course seems desirable to him (*e*). In coming to this determination he must take into consideration the value of the subject-matter in dispute (*f*). Formerly a rule of practice obtained that where the value exceeded £50, the master would not summarily decide the matter without the consent of all parties (*g*). But such rule has not been made a rule of law, and there was always power to depart from it (*h*).

Where question of law arises.

1212. Where the facts are admitted but a question of law arises, the master may decide the matter summarily (*i*), since every decision of the master or judge at chambers, where he does not direct a special case or an issue, is a summary decision (*k*). The decision that he will dispose of the matter summarily is itself a summary decision (*l*). Where the only question is one of law, the

(*b*) *Discount Banking Co. of England and Wales* v. *Lambarde*, [1893] 2 Q. B. 329, C. A.

(*c*) *Abbott* v. *Richards* (1846), 15 M. & W. 194 (sheriff); *Walker* v. *Olding* (1862), 1 H. & C. 621 (execution creditor); *Martin* v. *Tritton and Jameson* (1844), Cab. & El. 226. In this case the order directing a sale was subsequently rescinded, and it was held that the sheriff was not liable, though the rescinding order did not, like the original order, contain a clause restraining an action.

(*d*) See note (*s*), p. 601, *ante*.

(*e*) R. S. C., Ord. 57, r. 8. See also *Discount Banking Co. of England and Wales* v. *Lambarde*, *supra*, *per* Lord ESHER, M.R., at p. 331. Under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*), in a sheriff's interpleader the court had no power summarily to dispose of the matter without the consent of both the creditor and the claimant (*Carlewis* v. *Pocock* (1836), 5 Dowl. 381; *Harrison* v. *Wright* (1845), 13 M. & W. 816), and it was necessary that the order should state that it was made by consent (*Harrison* v. *Wright*, *supra*). But where an order did not so state, it was held that, though bad under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*), it was binding and conclusive as an award, the parties having by their conduct agreed to submit the matter to the decision of the court (*ibid.*).

(*f*) *Ibid.*

(*g*) *Topham* v. *Greenside Glazed Fire-brick Co.* (1887), 37 Ch. D. 281, 295.

(*h*) *Victor* v. *Cropper* (1886), 3 T. L. R. 110, C. A.; *Harbottle* v. *Roberts*, [1905] 1 K. B. 572, C. A.

(*i*) R. S. C., Ord. 57, r. 9; *Dodds* v. *Shepherd* (1876), 1 Ex. D. 75; *Waterhouse* v. *Gilbert* (1885), 15 Q. B. D. 569, C. A.; *Lyon* v. *Morris* (1887), 19 Q. B. D. 139, C. A.

(*k*) *Re Tarn*, [1893] 2 Ch. 280, C. A.; *Van Laun & Co.* v. *Baring Brothers & Co.*, [1903] 2 K. B. 277, C. A. As to the power to direct a special case, see p. 616, *post*.

(*l*) *Bryant* v. *Reading* (1886), 17 Q. B. D. 128, C. A.; *Harbottle* v. *Roberts*, *supra*.

power of the master is not limited by the necessity of one or both of the parties consenting to his deciding it summarily (*m*), as is the case where the facts are in dispute (*n*).

Practice.

1213. Where the master (*o*) on the hearing of the summons comes to the conclusion that he will decide the subject-matter of the dispute summarily, it is not usual for an order to be drawn up; but the summons with the order indorsed is taken to the department of the masters' secretary for an appointment before the master to be indorsed (*p*). When the matter has been heard and determined, the master indorses his decision upon the summons, and an order is then drawn up in the Summons and Order Department embodying both orders made, and the whole matter, *i.e.*, the application for relief, as well as the dispute between the claimants, disposed of.

SUB-SECT. 6.—*Transfer to County Court.*

Transfer to county court.

1214. Where the amount or value of the matter in dispute does not exceed £500, the court (*q*) or judge may order the transfer of interpleader proceedings to a county court (*r*).

Where resort is had to this power the whole proceeding must be transferred, not merely an issue for trial (*s*).

SUB-SECT. 7.—*Issue.*

(i.) *In General.*

Terms of the order.

1215. Where the master (*o*) considers that the subject-matter of the dispute is not one for summary determination he may direct an issue to be drawn up and tried with or without a jury. But he may, in a proper case, instead of directing an issue, refer the matter to an arbitrator or official referee (*t*). The order usually provides for the disposal of the subject-matter of the dispute pending the trial of the issue, which party is to be the plaintiff and which the defendant (*u*), the form of the issue, its preparation, the place and mode of trial; and, where the applicant is a sheriff, the order deals also with his possession, sale or retention of the goods seized, the giving of security by the claimant, and generally directs that no action be brought against the sheriff (*v*).

(*m*) R. S. C., Ord. 57, r. 9.

(*n*) *Ibid.*, r. 8.

(*o*) See note (*s*), p. 601, *ante*.

(*p*) A fee of 10*s.* for each hour taken by the master in determining the matter must be paid in the masters' secretary's department.

(*q*) As to the meaning of "court," see note (*s*), p. 601, *ante*.

(*r*) See title COUNTY COURTS, Vol. VIII., p. 443. In practice the order to remit is very frequently made.

(*s*) *Vizard* v. *Gill*, *Vizard* v. *Maule* (1893), 95 L. T. Jo. 255. For form of order, see R. S. C., Appendix K, No. 56A.

(*t*) *Drake* v. *Brown* (1835), 2 Cr. M. & R. 270; see title ARBITRATION, Vol. I., pp. 437 *et seq.*

(*u*) R. S. C., Ord. 57, r. 7.

(*v*) For forms, see R. S. C., Appendix K, Form 52. A form very similar to that in present use is given in *Crump* v. *Day* (1847), 4 C. B. 760, 761. A clerical mistake appearing on the face of the issue does not invalidate it (*Saunderson* v. *Perrin* (1870), 22 L. T. 419).

SECT. 5.

The Order.

(ii.) *Disposal of the Subject-matter pending Trial.*

Claimant must generally pay into court amount of value of the goods or give security.

1216. Where the applicant is a sheriff in possession, the claimant is generally ordered either to pay into court a sum of money equal to the value of the goods, or to give security to the satisfaction of the master (*w*) for the payment of that amount in accordance with the orders of the court, and also, if he desires the sheriff to withdraw or to prevent a sale (*x*), to pay to the sheriff the possession money from the date of the order until payment into court or security given. If the claimant cannot give security he may be allowed to pay possession money *de die in diem* until the trial of the issue.

Where claimant a receiver.

Where the claimant is a receiver appointed by the court the usual order may be departed from, and the receiver be merely directed to hold the goods and keep them subject to the further order of the court (*a*).

Second execution.

Where an issue has been directed between a claimant and the execution creditor, and the claimant has paid into court the value of the goods, and subsequently another execution is levied at the instance of a different execution creditor, and the claimant makes another claim to the goods, and the sheriff again interpleads, the claimant must pay into court another sum to abide the event of the trial of the issue between him and the second execution creditor (*b*).

(iii.) *Security for Costs.*

When security for costs will be ordered.

1217. The decision as to which party shall be plaintiff and which defendant affects to some extent the further question as to whether security for costs shall be ordered to be given. In this connection the rules applicable to ordinary litigation apply, and ought to be followed (*c*). This is, however, subject to the limitation that in considering whether security shall be ordered from either party to the issue, the nominal position of the parties does not determine the matter, but the real position must be looked at (*d*). It must be determined which party to the issue is really and substantially the plaintiff. Therefore, the defendant to the issue may be ordered to give security, provided he is substantially the plaintiff (*e*), or, at

(*w*) See note (*s*), p. 601, *ante*.

(*x*) R. S. C., Appendix K, Form 54; see also p. 604, *ante*.

(*a*) *Purkiss* v. *Holland* (1887), 31 Sol. Jo. 702, C. A.

(*b*) *Kotchie* v. *Golden Sovereigns, Ltd.*, [1898] 2 Q. B. 164, C. A.

(*c*) *Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548, C. A., *per* LINDLEY, L.J., at p. 553; *Belmonte* v. *Aynard* (1879), 4 C. P. D. 221, 352, C. A. In *Benazech* v. *Bessett* (1845), 1 C. B. 313, the plaintiff in the action and issue was ordered to give security, as he was a foreigner residing out of the jurisdiction; in *Webster* v. *Delafield* (1849), 7 C. B. 187, the claimant was ordered to give security for a similar reason; in *Frost* v. *Heywood* (1843), 2 Dowl. (N. S.) 801, a bankrupt plaintiff was ordered to give security, but in *Ridgway* v. *Jones* (1860), 29 L. J. (Q. B.) 97, insolvency was held an insufficient reason in itself for ordering security; in *Deller* v. *Prickett* (1850), 15 Q. B. 1081 (where the claimant was substituted as defendant, security was ordered, as her solvency was doubtful). See also title PRACTICE AND PROCEDURE.

(*d*) *Rhodes* v. *Dawson, supra; Tomlinson* v. *Land and Finance Corporation* (1884), 14 Q. B. D. 539, C. A.

(*e*) *Williams* v. *Crosling* (1847), 3 C. B. 957 (where the defendant to the issue residing out of the jurisdiction was ordered to give security because he was the real plaintiff); *Tomlinson* v. *Land and Finance Corporation, supra* (where

least, as much so as the nominal plaintiff (*f*), and the nominal plaintiff may escape the obligation on the ground that he is substantially the defendant, or, at least, as much so as the nominal defendant (*g*).

The matter is one purely for the discretion of the court (*h*). In a case where the security ordered was not given, and the claimant six months afterwards applied for judgment in his favour, an order was made for security to be given within a fortnight, otherwise the claimant to be at liberty to obtain his judgment (*i*).

(iv.) *Parties.*

Which party entitled to be plaintiff.

1218. In the sheriff's interpleader the claimant is as a general rule made the plaintiff, and the burden of proof rests upon him where the goods seized were at the time of seizure in the possession of the judgment debtor, possession being *primâ facie* evidence of title (*k*). If, however, the claimant was in possession at the time of the seizure, the burden of proof may be upon the execution creditor, thus reversing the ordinary rule, and the execution creditor may be made plaintiff (*l*).

Where the applicant is a stakeholder, there is no such general rule as to which party shall be plaintiff and which defendant. The decision depends upon the circumstances of each case. Where an action has already been commenced against the applicant, the plaintiff in the action is frequently the plaintiff to the issue and

defendants (a limited company) were ordered to give security on a similar ground).

(*f*) See *Tomlinson* v. *Land and Finance Corporation* (1884), 14 Q. B. D. 539, C. A. (where it was held that both parties might be said to be plaintiffs and that security might be ordered from either); and see also *Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548, C. A., *per* LINDLEY, L.J., at p. 553; and *Re La Compagnie Générale d'Eaux Minérales et de Bains de Mer*, [1891] 3 Ch. 451, 458 (where it was held that mutual security could be ordered where both parties were out of the jurisdiction).

(*g*) *Belmonte* v. *Aynard* (1879), 4 C. P. D. 221, 352, C. A. (plaintiff out of the jurisdiction not ordered to give security, as substantially he was defendant); see also *Rhodes* v. *Dawson*, *supra*, *per* LINDLEY, L.J., at p. 553: "It may be that in some cases each party is as much a plaintiff as the other" (*ibid.*); see *Tomlinson* v. *Land and Finance Corporation*, *supra*, where it was held that the execution creditor and claimant were really both plaintiffs.

(*h*) *Workmeister* v. *Healy* (1876), 10 I. R. C. L. 450 (where the plaintiff to the issue applied that the defendant should give security as he resided out of the jurisdiction, but the plaintiff also resided out of the jurisdiction, and the application was refused). Compare *Re La Compagnie Générale d'Eaux Minérales et de Bains de Mer*, *supra*, at p. 458 (where mutual security was ordered). In *Ridgway* v. *Jones* (1860), 29 L. J. (Q. B.) 97, the court refused an application by a plaintiff to the issue for security either by the defendant to the issue, who was insolvent, or by the defendant to the original action (applicant in the interpleader proceedings) on the grounds (1) that insolvency was an insufficient reason in itself; (2) that the defendant to the action ought not to be put in a worse position merely because the claimant was insolvent.

(*i*) *Melin* v. *Dumont* (1869), 20 L. T. 366; *Tassie* v. *Kennedy* (1848), 5 Dow. & L. 587. In *Kelly* v. *Brown* (1836), 5 Dowl. 264, the court refused to add to an order for security leave to sign judgment if security were not given within the specified time.

(*k*) *Yorke* v. *Smith* (1851), 21 L. J. (Q. B.) 53; *Bently* v. *Hook* (1834), 2 Dowl. 339; see further, p. 613, *post*.

(*l*) See *Gerhard* v. *Montagu & Co.* (1889), 61 L. T. 564.

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the other claimant defendant, but, where desirable, the positions may be reversed (*m*).

New trial where wrong party plaintiff.

1219. If substantial injury has been done by the wrong party being directed to be plaintiff, or by his being allowed to begin at the trial of the issue, a new trial may be granted (*n*).

Power to add or substitute parties.

1220. There is power to add parties before and after the issue has been drawn up (*o*), and to substitute a new claimant as plaintiff to the issue where the party originally made plaintiff refuses to proceed with the trial (*p*).

Right of counsel to address the jury.

1221. In a case where the claimant to the property and a purchaser from him were both made plaintiffs to the issue, after counsel for the claimant had been heard, counsel for the purchaser was refused permission to address the jury (*q*).

Where parties to issue, companies having members in common.

1222. Where execution had been issued against shareholders in a banking company, upon a judgment against them obtained by another banking company, and the issue was whether the shareholders of the defendant company were indebted to the plaintiff company in any and what sum, it was held that some of the shareholders who were made defendants to the issue could not object that some of the parties to the record were members of both companies (*r*).

(v.) *Form.*

Form not vital.

1223. The form of the issue is immaterial (*s*) and is merely directed to the purpose of informing the conscience of the court (*t*).

So where a claimant had claimed all the goods seized, and the issue was as to whether all the goods were his as against the execution creditor, and it transpired that the claimant was entitled to part of them only, the issue was not decided against the claimant, but it was determined whether the goods or part of them, and if so, what part, was the property of the claimant (*a*).

Where goods have been seized at the instance of several judgment creditors, all but one of whom have abandoned the execution upon a claim to all the goods being made, the court may order a sale of enough of the goods to satisfy the claim of that creditor who has not abandoned, and an issue as to whether the goods

(*m*) *Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548, C. A.
(*n*) *Edwards* v. *Matthews* (1847), 16 L. J. (EX.) 291.
(*o*) *Bird* v. *Mathews* (1882), 46 L. T. 512, C. A.
(*p*) *Lydal* v. *Biddle* (1836), 5 Dowl. 244.
(*q*) *Gayton* v. *Espin* (1859), 1 F. & F. 722.
(*r*) *Bosanquet* v. *Woodford* (1843), 5 Q. B. 310.
(*s*) See *Carne* v. *Brice* (1840), 7 M. & W. 183, *per* PARKE, B., at p. 185; *Gadsden* v. *Barrow* (1854), 9 Exch. 514, *per* ALDERSON, B., at p. 517; *Edwards* v. *English* (1857), 7 E. & B. 564, *per* Lord CAMPBELL, C.J., at p. 568; *Richards* v. *Jenkins* (1886), 17 Q. B. D. 544, *per* WILLS, J., at p. 547.
(*t*) *Carne* v. *Brice*, *supra*; *Plummer* v. *Price* (1878), 39 L. T. 657, C. A., *per* BRAMWELL, L.J., at p. 658.
(*a*) *Plummer* v. *Price*, *supra*; compare *Morewood* v. *Wilks* (1833), 6 C. & P. 144.

seized and sold by the sheriff, or some part thereof, were the property of the claimant as against that creditor (*b*).

Power of master to settle form.

1224. Where the parties cannot agree as to the statement of the issue, or where both parties do not consent (*c*), application may be made to the master (*d*) to settle its terms.

In general.

1225. In a sheriff's interpleader, where the goods seized were in the judgment debtor's possession at the time of the seizure, the form of the issue as a general rule is whether the goods or money or part thereof were the property of the claimant (plaintiff to the issue) as against the execution creditor (defendant to the issue) at the time of the execution of the process, not whether the goods or money are the property of the claimant or of the execution debtor simply (*e*).

Form may be reversed.

Where the goods at the time of seizure were in the claimant's possession, the form of the issue may be reversed (*f*).

Variations in form.

1226. The form of issue necessarily varies somewhat according to the particular circumstances. Where after the seizure a receiving order has been made against the execution debtor, and the trustee in bankruptcy is the claimant, the form may be "whether the money now in the hands of the sheriff is the property of the said claimant as against the execution creditor" (*g*). So also where an execution creditor had obtained the appointment of a receiver in an action against a foreign company, and the money in the hands of the receiver was claimed by liquidators appointed by a foreign tribunal, an issue was directed as to whether the liquidators or the

(*b*) *Tebb* v. *Powell* (1905), 93 L. T. 468, C. A.

(*c*) R. S. C., Ord. 57, r. 8.

(*d*) See note (*s*), p. 601, *ante*.

(*e*) *Belcher* v. *Patten* (1848), 6 C. B. 608; *Gadsden* v. *Barrow* (1854), 9 Exch. 514; *Lott* v. *Melville* (1841), 9 Dowl. 882; *Morewood* v. *Wilks* (1833), 6 C. & P. 144; *Green* v. *Stevens* (1857), 2 H. & N. 146; *Schroeder* v. *Hanrott* (1873), 28 L. T. 704; *Richards* v. *Jenkins* (1886), 17 Q. B. D. 544, *per* WILLS, J., at p. 547; (1887), 18 Q. B. D. 451, C. A., *per* Lord ESHER, M.R., at p. 455; *Discount Banking Co. of England and Wales* v. *Lambarde*, [1893] 2 Q. B. 329, C. A., *per* BOWEN, L.J., at p. 332; see *Shingler* v. *Holt* (1864), 7 H. & N. 65. This form of issue was probably adopted for the express purpose of enabling any person lawfully entitled to possession to sustain his claim (see *Green* v. *Stevens*, *supra*, *per* POLLOCK, C.B., and *Schroeder* v. *Hanrott*, *supra*, *per* BOVILL, C.J.). "The meaning must be that the question is to be asked with relation to the moment before the sheriff seizes. . . . The issue is whether the goods are then the goods of the claimant as against the execution creditor so as to prevent the execution creditor having a right to require the sheriff to seize them" (*Richards* v. *Jenkins*, *supra*). In *Edwards* v. *Matthews* (1847), 16 L. J. (EX.) 291, the form seems to have been whether the goods were the property of the claimant (plaintiff) or the execution creditor (defendant). In *Morewood* v. *Wilkes*, *supra*, the issue was merely whether the goods at the time of the seizure were the property of the claimant, and the jury were directed that the question was whether all the goods seized were the property of the claimant, for if not all were his, they must find a verdict for the defendants. In *Green* v. *Rogers* (1845), 2 Car. & Kir. 148, the proper issue was held to be whether the goods were the goods of the claimant (plaintiff), not whether they were the goods of the claimant or the execution creditor, and that it was not in issue whether the goods were those of the execution debtor or not.

(*f*) *Gerhard* v. *Montagu & Co.* (1889), 61 L. T. 564.

(*g*) *Dibb* v. *Brooke & Sons*, [1894] 2 Q. B. 338; see *Parker* v. *Booth* (1831), 1 Moo. & S. 156; *Northcote* v. *Beauchamp* (1831), 1 Moo. & S. 158 (where the form of the issue seems to have been whether the assignees in bankruptcy or the execution creditor were entitled to the moneys in the sheriff's hands).

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judgment creditor was entitled to the money in the receiver's hands (*h*).

Title.

1227. Where the application for relief is made in an action, the issue is intituled in the action, and "In the matter of an issue ordered to be tried between —— (the plaintiff to the issue) and —— (the defendant to the issue)." Where the proceedings do not arise out of an action, the issue is intituled "In the matter of the Rules of the Supreme Court, 1883," "In the matter of an issue, etc.," as above (*i*).

Failure to set down for trial.

1228. If the plaintiff to the issue fails to set it down, the master (*j*) may dismiss it for want of prosecution (*k*), and will order the subject-matter to be dealt with as he thinks fit.

No power to go outside issue.

1229. Where an issue has been ordered to try the right to goods in the hands of a stakeholder, it is submitted that the court has no power to transform the issue into an action, in order that other questions, as to the liability of one of the claimants to the other, may be introduced and determined (*l*).

(vi.) *Trial.*

Trial without jury unless specially ordered.

1230. Under the present rules, unless trial by jury is expressly ordered by the order directing the issue, or on a subsequent application, the issue is tried without a jury (*m*).

Discovery.

1231. The Rules of the Supreme Court relating to discovery apply to the trial of interpleader issues, with the necessary modifications, as in the trial of actions (*n*).

Postponement of trial.

1232. Any application to postpone the trial, if the issue is not set down, should be made to a master (*o*). If already set down, the application in the King's Bench Division must now be made to the senior judge taking the list of actions for trial in which it is set down.

Failure to proceed with trial.

1233. Where a bond, which had been given under an interpleader order by a claimant as security for costs, contained a condition that the bond should be void if he should proceed to trial according to the

(*h*) *Levasseur* v. *Mason and Barry*, [1891] 2 Q. B. 73, C. A.

(*i*) In *Elliot* v. *Sparrow* (1835), 1 Har. & W. 370, where two days before the trial of the issue the claimant relinquished his claim and the execution creditor applied for costs on an affidavit intituled in the issue, the rule was refused on the ground that the affidavit should have been intituled in the original action.

(*j*) See note (*s*), p. 601, *ante*.

(*k*) See title PRACTICE AND PROCEDURE.

(*l*) *Eschger Ghesquirer & Co.* v. *Morrison, Kekewich & Co.* (1890), 6 T. L. R. 145, C. A.

(*m*) R. S. C., Ord. 36, rr. 2, 6, 7. Prior to the operation of the R. S. C., 1883, an issue could not be tried by a judge alone (*Hamlyn* v. *Betteley* (1880), 6 Q. B. D. 63, C. A.).

(*n*) R. S. C., Ord. 57, r. 13; *White* v. *Watts* (1862), 12 C. B. (N. S.) 267. For the general principles relating to discovery, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 36.

(*o*) See note (*s*), p. 601, *ante*; and see also *Kebel* v. *Philpot* (1839), 9 Sim. 614 (where it was held that the application must in all cases be made to the court which ordered the issue); *Hargrave* v. *Hargrave* (1847), 4 C. B. 648. But under the present practice the application should be made as stated in the text (R. S. C., Ord. 54, r. 34).

order, and on the issue coming on the parties agreed to withdraw a juror, and an order was made directing the claimant to proceed to trial at the next sittings, it was held upon his failure to proceed that the condition meant that a trial should take place, and was not satisfied by the first proceeding to trial (*p*).

(vii.) *Right to set up Jus Tertii.*

What claimant must show in sheriff's interpleader.

1234. In a sheriff's interpleader, where the goods seized were at the time of seizure in the possession of the judgment debtor, and the form of the issue is therefore as to whether the goods seized were at the time of seizure the goods of the claimant as against the execution creditor, the claimant must show that he has a better title of some sort in himself than that of the execution creditor (*q*), and cannot give himself a title or defeat that of the execution creditor by merely showing that someone else has a title superior to that of both himself and the execution creditor (*r*). That question, so far as the claimant is concerned, must be left to the execution creditor and the third person to determine (*s*). The claimant must show either an absolute or a special property in the goods and also such right of possession as would entitle him to recover in an action against the sheriff (*t*).

It is not sufficient to show that the defendant had no title. The claimant must make out some title in himself (*a*).

On the other hand, it is open to the execution creditor, where defendant to the issue, to defeat the claim of the claimant by establishing a title to the goods in a third party which is superior to his own (*b*). This rule is in substance only a legitimate application of the maxim *potior est conditio defendentis* (*c*).

Right of second mortgagee to set up title of first mortgagee.

1235. The rule does not prevent a second mortgagee of the goods seized setting up the title of the first mortgagee so as successfully to maintain, by virtue of the purchase of the equity of redemption, as against the execution creditor that he has all the property in the goods, which the first mortgagee has not (*d*).

Where property seized is trust property.

1236. Where the property seized is trust property it is clear that the execution creditor has no right to the goods, but the claimant

(*p*) *Williams* v. *Gray and Normansell* (1850), 19 L. J. (C. P.) 382.

(*q*) *Richards* v. *Jenkins* (1887), 18 Q. B. D. 451, C. A., following *Richards* v. *Johnston* (1859), 4 H. & N. 660.

(*r*) *Carne* v. *Brice* (1840), 7 M. & W. 183, as explained in *Richards* v. *Jenkins* (1886), 17 Q. B. D. 544, *per* WILLS, J., at p. 547; *Green* v. *Rogers* (1845), 2 Car. & Kir. 148.

(*s*) *Ibid.*; *Jennings* v. *Mather*, [1901] 1 K. B. 108.

(*t*) *Gadsden* v. *Barrow* (1854), 9 Exch. 514, *per* PARKE, B., at p. 515, followed in *Richards* v. *Jenkins* (1886), 17 Q. B. D. 544, at p. 548; *Jennings* v. *Mather*, *supra*. For further illustrations, see *Chase* v. *Goble* (1841), 2 Man. & G. 930; *Belcher* v. *Patten* (1848), 6 C. B. 608; *Edwards* v. *English* (1857), 7 E. & B. 564, as explained in *Richards* v. *Jenkins* (1886), 17 Q. B. D. 544; *Green* v. *Stevens* (1857), 2 H. & N. 146.

(*a*) *Jennings* v. *Mather*, *supra*.

(*b*) *Richards* v. *Jenkins* (1886), 17 Q. B. D. 544.

(*c*) *Ibid.*, *per* WILLS, J., at p. 551.

(*d*) *Usher* v. *Martin* (1889), 24 Q. B. D. 272, distinguishing *Richards* v. *Jenkins* (1886), 17 Q. B. D. 544.

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must show a definite title in himself to them. A lien which a trustee for the benefit of creditors, who is carrying on the business of the debtor, has over the goods, is such a sufficient interest or title in the claimant as will prevail over that of the execution creditor. On the bankruptcy of the trustee his title passes to the trustee in bankruptcy, who is, therefore, entitled to the goods as against the execution creditor, even though he cannot deal with the goods as assets in the bankruptcy (*e*).

Where property seized is charged with payment of debentures.

1237. Where the goods seized are validly charged with the payment of the amount of debentures, and it is admitted that the charge far exceeds the value of the goods in question, the rights of the execution creditor are subject not only to the legal but also to the equitable rights of the debenture-holders, who have a sufficient title in them to prevent the sheriff selling them to the prejudice of their security (*f*).

Where goods seized include articles pawned.

1238. Where a receiver of a pawnbroker's business had been appointed, but before the security was perfected, the sheriff on behalf of a creditor seized goods in the possession of the debtor, including articles pawned, which the receiver afterwards claimed, it was held that the debtor had a qualified property in the redeemable articles which was not intercepted by the appointment of the receiver, and that the sheriff was entitled to hold them on behalf of the execution creditor, and to receive money paid to redeem them (*g*)

Grounds must be raised at trial of issue.

1239. On an issue, all grounds of claim or defence are open, and therefore a party, after failing at the trial to raise any such ground, cannot do so in subsequent proceedings (*h*).

(viii.) *Evidence.*

Rule same as in trial of actions.

1240. The same rules of evidence apply on the trial of an interpleader issue as on the trial of any other issue or action (*i*).

Evidence confined to matters relevant to the question at issue.

1241. The evidence must be confined to matters relevant to the question at issue. Thus, where the form of an issue between the execution creditor and assignees in bankruptcy was whether the execution was valid against the *fiat* in bankruptcy, the execution creditor was not entitled by the terms of the issue to dispute the bankruptcy, as the issue had not been directed to that point (*k*). Again, where the issue was whether the property in the

(*e*) *Jennings* v. *Mather*, [1901] 1 K. B. 108; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 168.

(*f*) *Davey & Co.* v. *Williamson & Sons*, [1898] 2 Q. B. 194, *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 200; and see title COMPANIES, Vol. V., pp. 350, 352.

(*g*) *Re Rollason*, *Rollason* v. *Rollason* (1887), 56 L. T. 303.

(*h*) *Re Hilton*, *Ex parte March* (1892), 67 L. T. 594; compare *Williams* v. *Richardson* (1877), 36 L. T. 505; see title ESTOPPEL, Vol. XIII., p. 333.

(*i*) *Emmott* v. *Marchant* (1878), 3 Q. B. D. 555; see *Yorke* v. *Smith* (1851), 21 L. J. (Q. B.) 53 (unstamped document held inadmissible); *Gugen* v. *Sampson* (1866), 4 F. & F. 974; *Pooley* v. *Goodwin* (1835), 5 Nev. & M. (K. B.) 466, 472. See title EVIDENCE, Vol. XIII., pp. 419 *et seq.*

(*k*) *Linnit* v. *Chaffers* (1843), 4 Q. B. 762, *per* Lord DENMAN, C.J., at p. 766.

rolling stock of a railway company was in the plaintiff as against an execution creditor, and the plaintiff's title depended on a bond given by the railway company to another party and assigned to the plaintiff as security for a loan, and an action brought upon the bond had been compromised by a transfer of the rolling stock to the plaintiff, the execution creditor was not entitled to adduce evidence to impeach the original legality of the bond (*l*). Again, where the claim of the claimant as against the execution creditor depended on an assignment by deed by way of security, and the main question at issue was whether the advances made by the claimant were fictitious, and the deed fraudulent, an admission of the advances made by the debtor in the absence of the execution creditor was held inadmissible as evidence for the plaintiff (*m*).

Bill of sale given by sheriff.

1242. A bill of sale given by a sheriff to the claimant when in possession under a prior execution, though perhaps not sufficient evidence in itself of the claimant's title, is made sufficient when evidence of the seizure prior to the bill is given (*n*).

(ix.) *Disposal of Whole Matter.*

Court may now dispose of whole proceedings after trial of the issue.

1243. The court (*o*) before whom the issue is tried may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for (*p*).

SUB-SECT. 8.—*Substitution of Claimant for Defendant.*

Power to substitute claimant for defendant in stakeholder's interpleader.

1244. In an interpleader application by a defendant, the court instead of directing an issue between the plaintiff and claimant and staying the action, may direct the action to proceed, but that the claimant be made a defendant, in lieu of, or in addition to, the applicant (*q*). Substitution "in lieu of" the defendant does not mean that the substituted defendant stands exactly in the original defendant's shoes or in the actual place of the original defendant, but merely "instead of." There is therefore no power to limit the defence of the substituted defendant to that which the original defendant could set up (*r*).

(*l*) *Blackmore* v. *Yates* (1867), L. R. 2 Exch. 225.
(*m*) *Coole* v. *Braham* (1848), 3 Exch. 183.
(*n*) *Hornidge* v. *Cooper* (1858), 27 L. J. (EX.) 314.
(*o*) As to the meaning of "court," see note (*s*), p. 601, *ante*.
(*p*) R. S. C., Ord. 57, r. 13. This rule also includes an order for payment out or delivery over of the subject-matter to the successful party. Formerly the case went back to the judge in chambers to order what should be done and to deal with the rights of the parties having regard to the result of the trial of the issue (see *Robinson* v. *Tucker* (1884), 14 Q. B. D. 371, C. A.; *Discount Banking Co. of England and Wales* v. *Lambarde*, [1893] 2 Q. B. 329, 331, C A.; *McNair & Co.* v. *Audenshaw Paint and Colour Co.*, [1891] 2 Q. B. 502, 506 C. A.). See, further, p. 619, *post*.
(*q*) R. S. C., Ord. 57, r. 7. In an old case where an action had been brought against a sheriff by the claimant, upon the sheriff applying for relief, the court instead of directing an issue ordered that the action should proceed, but that the execution creditor should be substituted as defendant (*Brown* v. *Ludham* (1843), 6 Man. & G. 169).
(*r*) *Gerhard* v. *Montague & Co.* (1889), 38 W. R. 76.

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SUB-SECT. 9.—*Special Case.*

Power to order special case.

1245. Where the question between the claimants is a question of law, and the facts are not in dispute, the court (*s*) may order a special case to be stated for the opinion of the court (*t*). Where this is done the ordinary rules relating to special cases apply (*u*).

SUB-SECT. 10.—*Enforcement of Order.*

Power to attach.

1246. The court (*t*) has power in a proper case to attach a party who fails to carry out its order (*a*), or to commit for contempt of court a party who prevents the order being carried out (*b*).

SECT. 6.—*Appeal.*

SUB-SECT. 1.—*In General.*

Enactments.

1247. The wording of the rule (*c*) which now, together with statutory enactments (*d*), governs the question of appeal from the various orders or judgments made in the course of interpleader proceedings has given rise to much perplexity. The question has been described as being a legal puzzle (*e*). The rule provides that "except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the court or a judge in a summary manner under rule 8 of this order shall be final and conclusive against the claimants and all persons claiming under them unless by special leave of the court or judge as the case may be or of the Court of Appeal." The statutory enactments existing at the time of the framing of this rule, which related specifically to appeals in interpleader proceedings, were the Interpleader Act (*f*), ss. 1, 2, and the Common Law Procedure Act, 1860 (*g*), s. 17. After the framing of the rule the Statute Law Revision Act, 1883 (*h*), which was framed with reference to the rules, received the royal assent (*i*), and repealed all the then existing statutory enactments with regard to interpleader in the High Court, except the Common Law Procedure Act, 1860 (*j*), s. 17.

(*s*) As to the meaning of "court," see note (*s*), p. 601, *ante*.

(*t*) R. S. C., Ord. 57, r. 9. For a recent instance, see *Newman* v. *Oughton*, [1911] 1 K. B. 792 (where a question of law having arisen during the master's consideration of an interpleader matter referred to him for summary determination, leave was obtained to use the master's notes of the facts as a special case raising the question).

(*u*) R. S. C., Ord. 34; see title PRACTICE AND PROCEDURE.

(*a*) *Collins* v. *Cliff* (1863), 8 L. T. 466; *Angell* v. *Baddeley* (1878), 3 Ex. D. 49, C. A., *per* BRETT, L.J., at p. 53 (sheriff).

(*b*) *Cooper* v. *Asprey* (1863), 9 Jur. (N. S.) 1198 (claimant). See, generally, titles CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 290 *et seq.*; EXECUTION, Vol. XIV., pp. 76, 77.

(*c*) R. S. C., Ord. 57, r. 11.

(*d*) Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 17; Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 19, 49, 50; Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 20; Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 5; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (2).

(*e*) *Lyon* v. *Morris* (1887), 19 Q. B. D. 139, C. A., *per* WILLS, J., at p. 145.

(*f*) Stat. (1831) 1 & 2 Will. 4, c. 58; see note (*l*), p. 581, *ante*.

(*g*) 23 & 24 Vict. c. 126.

(*h*) 46 & 47 Vict. c. 49.

(*i*) See *Lyon* v. *Morris*, *supra*.

(*j*) 23 & 24 Vict. c. 126.

SECT. 6. Appeal.

The Statute Law Revision Act, 1883 (*k*), was not intended to alter the law, but only to repeal the above-mentioned statutory enactments, because their subject-matter had been dealt with by the rules (*l*). The rule expressly excepts from its effect the provisions of any existing statute, the exception having been inserted to prevent any collision between the direction contained in it and the provisions of any existing statute (*m*). It means that, except where any statute may provide for an appeal (*n*), the matter is governed by the rule. The later provisions of the Judicature Acts (*o*) which relate to appeals have not had the effect of repealing or altering the Common Law Procedure Act, 1860 (*p*), nor have the words in the rule itself, which seem to imply that leave to appeal may be given, had the effect of giving by leave a right of appeal where the decision under the statutory enactment was final (*q*).

Rules do not apply to sheriff.

1248. The Common Law Procedure Act, 1860 (*r*), s. 17, and the Rules of the Supreme Court dealing with the subject of appeal, apply only to the claimants, and not to a sheriff. Therefore, a sheriff can appeal from the summary determination by a judge of an interpleader matter (*s*).

SUB-SECT. 2.—*Decision of Master.*

Appeal lies from summary decision of master on questions of fact and law.

1249. Notwithstanding that the rule (*t*) appears to make the summary decision of a master final (*u*), so far as the claimants are concerned, except by leave, an appeal lies to a judge in chambers from a summary decision of a master in an interpleader matter, even without leave (*v*), by virtue of another rule of the Supreme Court (*w*) which gives such an appeal to any person affected by any order or decision of a master. Where an issue is referred to the master for trial the appeal lies to a Divisional Court in the King's Bench Division (*x*).

(*k*) 46 & 47 Vict. c. 49.

(*l*) *Lyon* v. *Morris* (1887), 19 Q. B. D. 139, C. A., *per* FRY, L.J., at p. 148.

(*m*) *Ibid.*

(*n*) *Webb* v. *Shaw* (1886), 16 Q. B. D. 658, 663.

(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 19, 49, 58; Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 20; Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 5.

(*p*) 23 & 24 Vict. c. 126. See *Dodds* v. *Shepherd* (1876), 1 Ex. D. 75; *Turner* v. *Bridgett* (1882), 9 Q. B. D. 55, C. A.; *Buse* v. *Roper* (1897), 41 L. T. 457, C. A.; *Van Laun & Co.* v. *Baring Brothers & Co.*, [1903] 2 K. B. 277, 285, C. A.

(*q*) *Waterhouse* v. *Gilbert* (1885), 15 Q. B. D. 569, C. A.; *Van Laun & Co.* v. *Baring Brothers & Co.*, *supra*, *per* COLLINS, M.R., at p. 281.

(*r*) 23 & 24 Vict. c. 126.

(*s*) *Smith* v. *Darlow* (1884), 26 Ch. D. 605, C. A. "Parties," in the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 17, means the persons who claim title to the goods. R. S. C., Ord. 57, r. 11, is limited in its terms to the claimants.

(*t*) R. S. C., Ord. 57, r. 11.

(*u*) As to what is a "summary decision," see p. 606, *ante*.

(*v*) *Webb* v. *Shaw*, *supra*; *Bryant* v. *Reading* (1886), 17 Q. B. D. 128, C. A.; *Clench* v. *Dooley* (1886), 56 L. T. 122.

(*w*) R. S. C., Ord. 54, r. 21; see, further, title PRACTICE AND PROCEDURE.

(*x*) *Cox* v. *Bowen* (1911), 55 Sol. Jo. 581, C. A., following *Blair* v. *Clark*, [1908] 2 K. B. 548 (trial of a garnishee issue). So also where instead of proceeding under

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The rule as to appeals from a master is confined in terms to a summary decision (*y*) where the facts are in dispute, and the master acts with the consent of both claimants or on the request of one (*z*). But where the facts are not in dispute, and the question is purely one of law, the master may decide it summarily without consent or request, and an appeal lies from him to the judge in chambers (*a*).

SUB-SECT. 3.—*Decision of Judge in Chambers.*

No appeal from summary decision of judge.

1250. Where a judge disposes of the matter in dispute in a summary manner, (1) where the facts are in dispute and he acts at the request of one of the claimants or with the consent of both (*b*), or (2) in cases where the question is purely one of law and he decides it summarily without such consent or request (*c*), or (3) on appeal from the summary decision of a master (*d*)—in other words, where he disposes of the summons in any other way than by directing an issue or special case (*e*)—his decision is final, and notwithstanding the words of the rule (*f*), which seem to imply otherwise, there is no power in him or in the Court of Appeal to give leave to appeal (*g*).

SUB-SECT. 4.—*Summary Decision of Divisional Court.*

No appeal from summary decision of Divisional Court.

1251. Where the judge at chambers refers the summons to the Divisional Court, which decides the matter summarily, the decision is final (*h*).

SUB-SECT. 5.—*Trial of Issue by Judge alone.*

Appeal from decision on issue without a jury.

1252. Where an issue is tried in court by a judge without a jury an appeal lies to the Court of Appeal, without leave, from the decision of the judge as to the findings of fact or rulings of law in the same manner as an appeal lies from any other finding or ruling of a judge in court (*i*).

R. S. C., Ord. 57, r. 8, an order is made for reference of the whole cause or matter to a master, the appeal from a master lies to a Divisional Court in the King's Bench Division (*Gower* v. *Tobitt* (1891), 39 W. R. 193, C. A.; *Joyner* v. *Weeks*, [1891] 2 Q. B. 31, C. A.; *Munday* v. *Norton*, [1892] 1 Q. B. 403, C. A.; *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475, C. A.; *Fraser* v. *Fraser*, [1905] 1 K. B. 368, C. A.),

(*y*) R. S. C., Ord. 57, r. 11; see p. 606, *ante*.

(*z*) The rule only refers in terms to R. S. C., Ord. 57, r. 8.

(*a*) See *Re Tarn*, [1893] 2 Ch. 280, C. A.; and p. 606, *ante*.

(*b*) *I.e.*, under R. S. C., Ord. 57, r. 8; *Dodds* v. *Shepherd* (1876), 1 Ex. D. 75; *Bryant* v. *Reading* (1886), 17 Q. B. D. 128, C. A.; *Lyon* v. *Morris* (1887), 19 Q. B. D. 139, C. A.; *Waterhouse* v. *Gilbert* (1885), 15 Q. B. D. 569, C. A. For cases under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58), see *Shortridge* v. *Young* (1843), 12 M. & W. 5; *Burgh* v. *Schofield* (1842), 9 M. & W. 478.

(*c*) *I.e.*, under R. S. C., Ord. 57, r. 9 (first part of rule); *Re Tarn, supra*; *Van Laun & Co.* v. *Baring Brothers & Co.*, [1903] 2 K. B. 277, C. A., *per* COLLINS, M.R., at p. 285; *Topham* v. *Greenside Glazed Fire-brick Co.* (1887), 37 Ch. D. 281, *per* NORTH, J., at p. 294.

(*d*) *Webb* v. *Shaw* (1886), 16 Q. B. D. 658; *Bryant* v. *Reading*, *supra*; *Clench* v. *Dooley*, (1886), 56 L. T. 122.

(*e*) See pp. 607, 616, *ante*.

(*f*) R. S. C., Ord. 57, r. 11.

(*g*) *Dodds* v. *Shepherd, supra*; *Lyon* v. *Morris, supra*; *Re Tarn, supra*; *Van Laun & Co.* v. *Baring Brothers & Co., supra*.

(*h*) *Turner* v. *Bridgett* (1882), 9 Q. B. D. 55, C. A.

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19; *Dawson* v. *Fox* (1885),

SUB-SECT. 6.—*Trial of Issue by Judge and Jury.*

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1253. Where the issue is tried by a judge with a jury, the findings of fact by the jury and the rulings of the judge on questions of law are, without leave (*k*), open to review by means of a motion to the Court of Appeal to set aside the verdict and for a new trial (*l*).

Appeal from findings of jury on issue.

The Court of Appeal has power to order judgment to be entered for the successful appellant without ordering a new trial (*m*). The rules which apply to new trials in actions apply in the same manner to the trial of interpleader issues (*n*).

SUB-SECT. 7.—*Where Judge disposes of Whole Matter.*

1254. Where the judge who tries an issue exercises the powers given to him (*o*) of finally disposing of the whole matter of the interpleader proceedings, further complications as to the power of appeal from his decisions arise from the fact that he is exercising jurisdiction in two capacities. In trying the issue he is exercising the ordinary jurisdiction of a judge sitting in open court for the purpose of the trial of actions, and in that capacity the findings of fact by the judge or jury, as the case may be, and the rulings of the judge on questions of law are, as has been shown, open to an appeal just as they are in the trial of an action (*p*). But where after the trial of the issue he goes on to direct final judgment to be entered and to deal with the other rights of the parties arising upon the judgment in the issue, he is exercising the functions of a judge in chambers, to whom, before the rule, it was necessary to go back after the trial of the issue, for the purpose of getting a judgment on the issue and a final order disposing of the whole matter of the interpleader proceedings (*q*). Under the Common Law Procedure Act, 1860 (*r*), any order of a judge at chambers in an interpleader matter was final and without appeal, and it has been held under the present rules that anything done in the matter, except that

Appeal from decisions of judge on matters other than trial of issue.

14 Q. B. D. 377, C. A.; *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, C. A., *per* Lord ESHER, M.R., at p. 22. The wording of R. S. C., Ord. 57, r. 11, seems to imply that leave of the judge or of the Court of Appeal is necessary; and see *Robinson* v. *Tucker* (1884), 14 Q. B. D. 371, C. A., *per* BRETT, M.R., at p. 375. An appeal lay under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) (see note (*l*), p. 581, *ante*); see *Witt* v. *Parker* (1877), 46 L. J. (Q. B.) 450, C. A.; *Withers* v. *Parker* (1859), 4 H. & N. 810, Ex. Ch. See also title PRACTICE AND PROCEDURE.

(*k*) *Robinson* v. *Tucker*, *supra*, *per* BRETT, M.R., at p. 375; R. S. C., Ord. 57, r. 11.

(*l*) R. S. C., Ord. 40, rr. 3—5; *Robinson* v. *Tucker*, *supra*; *Burstall* v. *Bryant* (1883), 12 Q. B. D. 103, *per* Lord COLERIDGE, C.J., at p. 104.

(*m*) *Williams* v. *Mercier* (1882), 9 Q. B. D. 337, C. A.

(*n*) *E.g.*, *Janes* v. *Whitbread* (1851), 11 C. B. 406. See also title PRACTICE AND PROCEDURE.

(*o*) R. S. C., Ord. 57, r. 13.

(*p*) See *supra*.

(*q*) See p. 615, *ante*. The rule has made no real difference in the practice, except that the judge who tries the issue now disposes of the whole matter instead of the matter going back to the judge in chambers (*Discount Banking Co. of England and Wales* v. *Lambarde*, [1893] 2 Q. B. 329, C. A., *per* Lord ESHER, M.R., at p. 331).

(*r*) 23 & 24 Vict. c. 126.

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which occurred at the trial of the issue, is not the subject-matter of an appeal. In other words, what the judge does before or after the trial of an issue, whether at chambers or in open court, cannot be reviewed on appeal (*s*). But this does not hold good entirely so far as the judgment which the judge enters upon the findings of fact is concerned. This can be questioned on an appeal or application for a new trial (*t*), as the case may be (*a*), but the leave of the judge must first be obtained.

SUB-SECT. 8.—*Special Case.*

Appeal from decision of judge on special case.

1255. Where the question raised in the dispute is a question of law, and the court has ordered a special case to be stated for the opinion of the court, it seems that an appeal lies to the Court of Appeal from the determination by the judge (*b*).

SUB-SECT. 9.—*Costs.*

No appeal as to costs without leave.

1256. There is no appeal from an order of a judge as to costs only, without leave of the judge (*c*). Leave to appeal cannot be given by the Court of Appeal (*d*).

SUB-SECT. 10.—*Time.*

Time for appealing.

1257. The order or judgment made upon the trial of an interpleader issue, where the trial has been with or without a jury, is not a final but an interlocutory order for the purposes of calculating the time for appealing (*e*), and the appeal or application for a new trial or to set aside the judgment must be made before the expiration of fourteen days from the time the judgment or order is signed, entered, or otherwise perfected in the case of an appeal and within ten days after trial in the case of an application for a new trial (*f*). But, on the other hand, it has been held that for the purpose of calculating the length of notice to be given by the appellant (*g*), the order made by the King's Bench Division, upon an appeal from the judgment of a county court judge in an issue, is a final order (*h*).

SUB-SECT. 11.—*Bankruptcy.*

Appeal in bankruptcy.

1258. Where an order is made in bankruptcy in an interpleader matter, an appeal lies to the Court of Appeal (*i*).

(*s*) *Field* v. *Rivington* (1889), 5 T. L. R. 642, C. A. (where the judge had exercised his jurisdiction under R. S. C., Ord. 57, r. 13, and it was sought to appeal against his decision depriving the successful claimant of the costs of the interpleader proceedings).

(*t*) See p. 618, *ante*.

(*a*) *Dawson* v. *Fox* (1885), 14 Q. B. D. 377, C. A. (without jury); *Robinson* v. *Tucker* (1884), 14 Q. B. D. 371, C. A. (with jury).

(*b*) R. S. C., Ord. 34. See title PRACTICE AND PROCEDURE.

(*c*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49; *Hartmont* v. *Foster* (1881), 8 Q. B. D. 82, C. A.

(*d*) *Field* v. *Rivington*, *supra*.

(*e*) *McAndrew* v. *Barker* (1878), 7 Ch. D. 701, C. A.; *McNair & Co.* v. *Audenshaw Paint and Colour Co.*, [1891] 2 Q. B. 502, C. A.

(*f*) R. S. C., Ord. 58, r. 15 (appeal); R. S. C., Ord. 39, r. 4 (application for new trial). The notice is a fourteen days' notice (*ibid.*).

(*g*) *Ibid.*, r. 3.

(*h*) *Hughes* v. *Little* (1886), 18 Q. B. D. 32, C. A.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (2). See *Re Morris, Ex*

SECT. 7.—*Costs.*

SECT. 7. Costs.

SUB-SECT. 1.—*In General.*

1259. The court or a judge has power to make such orders as to costs in and for the purpose of any interpleader proceedings as may be just and reasonable (*k*). As a general rule, the applicant is allowed his costs, and, so far as the claimants are concerned, the rule which ordinarily obtains in actions, that the successful party gets his costs, is followed (*l*). A party who has obtained an order for costs is a judgment creditor for the purposes of garnishee proceedings (*m*). In general.

SUB-SECT. 2.—*Of Stakeholder.*

1260. In interpleader suits in equity the plaintiff to the bill (*i.e.*, the applicant for relief) was ordinarily given his costs if he conducted himself properly, and was allowed, if necessary, to recover them from the defendant who succeeded, the latter in turn being entitled to recover them, together with his own costs, from the defendant who failed (*n*). The plaintiff was generally allowed to deduct his costs from the fund in court (*o*), and he was not liable for the interest lost to the successful party after payment of the fund into court (*p*). Rule in equity.

In the common law courts, on the other hand, there are early decisions under the Interpleader Act (*q*) disallowing costs to the applicant on the ground that the relief he got by "the summary and cheap application" was sufficient compensation (*r*), but this view did not universally obtain (*s*). Rule at common law.

The ordinary rule in all divisions of the High Court now is that where the stakeholder has acted properly (*t*) he is allowed his costs Rule in all divisions of the High Court.

parte Streeter (1881), 19 Ch. D. 216, C. A.; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 263, 265.

(*k*) R. S. C., Ord. 57, r. 15. This rule appears to be a mere repetition of the last clause of the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58), s. 1, and must be similarly construed (*Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548, C. A., *per* LINDLEY, L.J., at p. 553). Formerly costs were not allowed until the termination of the proceedings (see *Hood* v. *Bradbury* (1844), 6 Man. & G. 981; see also *Bland* v. *Delano* (1838), 6 Dowl. 293).

(*l*) See *Re Rogers, Ex parte Sussex (Sheriff)*, [1911] 1 K. B. 104, 110.

(*m*) *Hartley* v. *Shemwell, Marples* v. *Hartley* (1861), 1 B. & S. 1; and see title EXECUTION, Vol. XIV., pp. 90 *et seq.*

(*n*) *Hendry* v. *Key* (1756), 1 Dick. 291.

(*o*) *Crawford* v. *Fisher* (1842), 1 Hare, 436, 444; *Meux* v. *Bell* (1841), 1 Hare, 73, 98.

(*p*) *East India Co.* v. *Campion* (1837), 4 Cl. & Fin. 616, H. L.; see also *Campion* v. *Colvin* (1836), 3 Bing. (N. C.) 17.

(*q*) Stat. (1831) 1 & 2 Will. 4, c. 58 (see note (*l*), p. 581, *ante*).

(*r*) *Lambert* v. *Cooper* (1837), 5 Dowl. 547, 549; see also *Roberts* v. *Bell* (1857), 7 E. & B. 323.

(*s*) *Pitches* v. *Edney* (1838), 6 Scott, 582; *Reeves* v. *Barraud* (1839), 7 Scott, 281; *Parker* v. *Finnett* (1833), 2 Dowl. 562; *Cotter* v. *Bank of England* (1834), 2 Dowl. 728; *Duear* v. *Mackintosh* (1834), 2 Dowl. 730. In these very early cases the practice which now prevails was considered the proper practice.

(*t*) For cases as to costs where the conduct of the stakeholder was questioned, see *Crawford* v. *Fisher*, *supra*, at p. 444; *Scottish Union Insurance Co.* v. *Steele* (1864), 9 L. T. 677; *Symes* v. *Magnay* (1855), 20 Beav. 47.

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out of the fund or subject-matter in dispute, and the claimant who is in the wrong has to indemnify to that extent the claimant who is entitled to the fund (*u*). Moreover, in addition to his costs, the stakeholder is allowed any charges to which he may be entitled, *e.g.*, as warehouseman or auctioneer, out of the fund or other subject-matter of the dispute, both costs and charges being allowed as a first charge on the fund (*a*). Where, however, the applicant has unnecessarily caused any portion of the costs, he may be disallowed that portion, and may be ordered to pay the costs occasioned by his misconduct (*b*).

Power to order costs of proceedings in the action where applicant is a defendant.

1261. On the hearing of the interpleader summons taken out by the defendant, the master has power to order that the plaintiff in the action shall pay the applicant's costs in the action, apart from his costs in the interpleader proceedings (*c*).

Costs against applicant.

1262. Where, instead of interpleading, the stakeholder litigates with both parties separately, he loses the benefit of the former procedure and may have to pay costs as against one of the parties instead of being allowed his costs out of the fund (*d*).

SUB-SECT. 3.—*Of Sheriff.*

Present rule.

1263. In the absence of misconduct, the sheriff is entitled to all his costs, charges, and expenses reasonably incurred, from the commencement of the interpleader proceedings to their final determination (*e*). Where, however, he improperly commences or

(*u*) *Cotter* v. *Bank of England* (1834), 2 Dowl. 728; *Duear* v. *Mackintosh* (1834), 2 Dowl. 730; *Symes* v. *Magnay* (1855), 20 Beav. 47; *Laing* v. *Zeden* (1874), 9 Ch. App. 736; *Searle & Co.* v. *Matthews*, [1883] W. N. 176; *Reading* v. *London School Board* (1866), 16 Q. B. D. 686; *Goodman* v. *Blake* (1887), 19 Q. B. D. 77.

(*a*) *Attenborough* v. *St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, 466, C. A.; *De Rothschild Frères* v. *Morrison, Kekewich & Co., La Banque de Paris et des Pays Bas* v. *Same, La Banque de France* v. *Same* (1890), 24 Q. B. D. 750, C. A.; *Harwood* v. *Betham* (1832), 1 L. J. (EX.) 180.

(*b*) *Searle & Co.* v. *Matthews, supra.*

(*c*) R. S. C., Ord. 54, r. 12, as amended by R. S. C., June, 1908, doing away with the decision in *Hansen* v. *Maddox* (1883), 12 Q. B. D. 100.

(*d*) *Laing* v. *Zeden, supra.*

(*e*) *Searle & Co* v. *Matthews, supra.* In several of the earlier decisions under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) the sheriff was refused costs because he was considered to be extremely well off in being protected against an action at so cheap a rate (*Barker* v. *Dynes* (1832), 1 Dowl. 169; *Bowdler* v. *Smith* (1832), 1 Dowl. 417; and see *Morland* v. *Chitty* (1833), 1 Dowl. 520; *Oram* v. *Sheldon* (1835), 3 Dowl. 640; *Field* v. *Cope* (1832), 1 Dowl. 567; *Jones* v. *Lewis* (1841), 8 M. & W. 264; *Cox* v. *Fenn* (1838), 7 Dowl. 50; *Lambert* v. *Cooper* (1837), 5 Dowl. 547; *Beswick* v. *Thomas* (1837), 5 Dowl. 458). He was, however, allowed to retain out of the goods seized his charges for poundage and his expenses of remaining in possession, where neither party appeared (*Eveleigh* v. *Salsbury* (1836), 5 Dowl. 369; see also *Hammond* v. *Nairn* (1841), 9 M. & W. 221), or where the execution creditor or claimant abandoned (*Dabbs* v. *Humphries* (1835), 3 Dowl. 377; *Wills* v. *Hopkins*, *Bragg* v. *Same* (1835), 3 Dowl. 347), or after trial against the unsuccessful party (*Scales* v. *Sargeson* (1835), 4 Dowl. 231; *Dabbs* v. *Humphries, supra; West* v. *Rotherham* (1836), 2 Bing. (N. C.) 527). In other early cases he was allowed his costs as against the claimant who abandoned (*Scales* v. *Sargeson, supra; Wills* v. *Hopkins, Bragg* v. *Same, supra*). After the coming into operation of the Rules of the Supreme Court it was laid down that the sheriff was entitled, in the absence of

continues the proceedings he may be disallowed his own costs (*f*), and even ordered to pay to the other parties the costs occasioned by his misconduct (*g*).

Possession money.

1264. Where the sheriff improperly remains in possession he will not be allowed possession money for that time (*h*). Nor will extra possession money be allowed if it is unnecessarily incurred owing to irregular procedure by the sheriff (*i*). But if the sheriff acts in obedience to an order of the court he will be allowed his costs of so acting, although in the end it turns out that the seizure was wrongful (*k*).

Form of order that execution creditor pay sheriff in first instance.

1265. Where the claimant is unsuccessful, the sheriff is still entitled to insist that the order directs the execution creditor to pay the sheriff's costs and charges in the first instance, with a remedy over to the execution creditor against the claimant, on the ground that he is entitled to get his costs from the party upon whose directions he acted and who, therefore, in a sense, made it necessary that interpleader proceedings should be resorted to (*l*).

Order where claim for rent.

Where the landlord distrained for rent after the sheriff had seized and a claim had been made upon which interpleader proceedings were commenced and an issue ordered, but upon the landlord distraining the issue was not proceeded with, it was held that the execution creditor should pay the sheriff's costs in the first place and that the claimant should repay half to him from the date of the claim (*m*).

Costs of keeping subject-matter of dispute.

1266. A sheriff is, as a rule, entitled to recover his expenses reasonably incurred in keeping the things seized, *e.g.*, when cattle

misconduct, to his costs from the time the interpleader proceedings commenced—that is to say, as against an unsuccessful claimant he was entitled to costs and possession money from the time of the notice of claim or from the time of sale, whichever was first; and as against the unsuccessful execution creditor, or where the execution creditor abandoned, he was entitled to costs from the time at which the latter authorised the carrying on of the interpleader proceedings (*Searle & Co.* v. *Matthews*, [1883] W. N. 176; *Goodman* v. *Blake* (1887), 19 Q. B. D. 77; *Bramsden* v. *Parker* (1885), 1 T. L. R. 510, C. A.). Where a claim is made improperly by the execution debtor on behalf of another he may have to pay the sheriff's costs (*Lewis* v. *Eicke* (1834), 2 Dowl. 337; *Philby* v. *Ikey* (1833), 2 Dowl. 222).

(*f*) *C.* v. *D.*, [1883] W. N. 207; see also *Glasier* v. *Cooke* (1835), 5 Nev. & M. (K. B.) 680; *Prosser* v. *Mallison* (1884), 28 Sol. Jo. 411, 616, C. A.

(*g*) *Ford* v. *Dilly* (1822), 5 B. & Ad. 885; *Bishop* v. *Hinxman* (1833), 2 Dowl. 166 (where the claim was clearly bad in law); *Dalton* v. *Furness* (1866), 35 Beav. 461 (failure to give notice of claim); *Re Oxfordshire* (*Sheriff*) (1837), 6 Dowl. 136 (where claim made by holder of bill of sale). But now a sheriff may interplead where the claimant has a bill of sale over the goods; see *Stern* v. *Tegner*, [1898] 1 Q. B. 37, C. A., cited p. 604, *ante*.

(*h*) *Underden* v. *Burgess* (1835), 4 Dowl. 104; compare *Scales* v. *Sargeson* (1836), 4 Dowl. 231.

(*i*) *Clark* v. *Chetwode* (1836), 4 Dowl. 635. The reasonableness of the sheriff's charges can be dealt with on taxation; see *Long* v. *Bray*, *Ex parte Wright* (1862), 10 W. R. 841.

(*k*) *Bland* v. *Delano* (1838), 6 Dowl. 293.

(*l*) *Smith* v. *Darlow* (1884), 26 Ch. D. 605, C. A.; *Stern* v. *Tegner*, *supra*; *Todd* v. *M'Keevir*, [1895] 2 I. R. 400, C. A.; *Re Rogers*, *Ex parte Sussex* (*Sheriff*), [1911] 1 K. B. 104, 110.

(*m*) *Lawson* v. *Carter* (1893), 63 L. J. (Q. B.) 159.

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are seized he is entitled to his expenses for agisting or keeping them (*n*).

Costs of appearing on an appeal.

1267. A sheriff is not entitled as a rule to his costs of appearing at the hearing of an appeal from the judgment on the issue, even where he has been served with notice of the appeal, as he is not a party to the issue (*o*). But if he has an interest in the appeal on account of the possibility of his costs being in jeopardy, he may be entitled to appear and to his costs (*p*), which may be ordered to be paid by the party who may ultimately, at the new trial ordered, be found to be in the wrong (*q*).

Where bankruptcy supervenes.

1268. Where the sheriff, after interpleader proceedings have been commenced, is served with notice of a receiving order before sale or completion of the execution within the meaning of the Bankruptcy Acts (*r*), he is bound to deliver the goods or the proceeds to the official receiver, and is not entitled as against him or the trustee in bankruptcy to costs for the time he remains in possession after service of the notice. He is only entitled to his costs up to the time of service (*s*). These costs are made a first charge upon the goods or money (*t*), but poundage is not included in them (*a*). Where there has been some delay during the interpleader proceedings by which possession money has been increased, but for which the sheriff is not responsible, he is entitled to withhold his possession money for the whole time (*b*). He is not so entitled if remaining in possession was, in the circumstances, improper (*c*). The sheriff is entitled to his costs of the interpleader proceedings, as they are "costs of the execution" within the Bankruptcy Act, 1890 (*d*), but is not entitled to deduct the costs of the execution creditor or of the claimant, since these costs do not come within the Act (*d*).

(*n*) *Malone* v. *Ross*, [1900] 2 I. R. 586, C. A.; *Brady* v. *Williams*, [1898] 2 I. R. 703; but compare *Gaskell* v. *Sefton* (1845), 14 M. & W. 802.

(*o*) *Re Morris, Ex parte Webster* (1882), 22 Ch. D. 136, C. A.

(*p*) *Trickett & Co.* v. *Girdlestone* (1897), 103 L. T. Jo. 81.

(*q*) *Re Morris, Ex parte Streeter* (1881), 19 Ch. D. 216, C. A.

(*r*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (1); see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 271 *et seq.*

(*s*) *Re Harrison, Ex parte Essex (Sheriff)*, [1893] 2 Q. B. 111.

(*t*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (1); and see title EXECUTION, Vol. XIV., pp. 34, 36.

(*a*) *Re Thomas, Ex parte Middlesex (Sheriff)*, [1899] 1 Q. B. 460, C. A.

(*b*) *Re Levy, Ex parte Essex (Sheriff)* (1890), 63 L. T. 291; *Re Beeston*, [1899] 1 Q. B. 626, C. A., approving *Re Hurley* (1893), 10 Morr. 120 (sheriff in possession for fifteen months at request of execution creditor and with consent of execution debtor); see also *Re Fenton, Ex parte Lithgow* (1878), 10 Ch. D. 169; *Re English and Ayling, Ex parte Murray & Co.*, [1903] 1 K. B. 680.

(*c*) *Re Finch, Ex parte Essex (Sheriff)* (1891), 65 L. T. 466 (sheriff held not entitled to recover as against the debtor or the debtor's estate costs of remaining in possession for an unreasonable period at the request of the execution creditor but without consent of the debtor).

(*d*) 53 & 54 Vict. c. 71, s. 11 (1), (2). See *Re Rogers, Ex parte Sussex (Sheriff)*, [1911] 1 K. B. 104. In such case the taxing master in bankruptcy is entitled to tax the sheriff's bill of costs and disallow the costs of the execution creditor and claimant, although they have been allowed by a taxing master acting under the order of a King's Bench master made on the interpleader proceedings (see

SECT. 7. Costs.

Where claim admitted by execution creditor.

1269. Where on receipt of notice of claim to goods or chattels taken in execution, the execution creditor within four days admits the claim and notifies the sheriff or his officer to that effect, he is only liable to the sheriff for any fees and expenses incurred prior to the receipt by the sheriff of the notice admitting the claim (*e*). If no admission by the execution creditor is received in due time, and the claimant does not withdraw his claim by notice in writing to the sheriff or his officer, the sheriff may apply for an interpleader summons, and if, after the issue, but before the return of the summons, the execution creditor admits the claim by notice in writing to the sheriff or his officer and to the claimant, or the claimant withdraws his claim by notice in writing to the sheriff or his officer (*f*), the judge or master may make an order for payment of the sheriff's costs, fees, charges and expenses, and the other party's costs against the execution creditor or the claimant as the case may be (*f*).

SUB-SECT. 4.—*Of Parties other than the Applicant.*

In general.

1270. The ordinary rule that the party who fails to appear, or abandons, or is unsuccessful, pays the costs of the successful party applies in interpleader matters as in actions (*g*), and he must also, as a rule, pay the applicant's costs and charges (*h*). But the

Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (2); Bankruptcy Rules, 1886 and 1894, r. 119; *Re Rogers, Ex parte Sussex (Sheriff)*, [1911] 1 K. B. 104).

(*e*) R. S. C., Ord. 57, r. 16; and see further, as to withdrawal by sheriff, p. 589, *ante*.

(*f*) R. S. C., Ord. 57, r. 17; *Perkins* v. *Burton* (1833), 2 Dowl. 108.

(*g*) *Bowen* v. *Bramidge* (1833), 2 Dowl. 213 (trial of issue); *Perkins* v. *Burton*, *supra* (non-appearance of claimant); *Dabbs* v. *Humphries* (1835), 3 Dowl. 377; *Wills* v. *Hopkins* (1835), 3 Dowl. 346; *Hyland* v. *Lennox* (1891), 28 L. R. Ir. 286 (abandonment); *Jones* v. *Regan* (1840), 9 Dowl. 580; *Melville* v. *Smark* (1841), 3 Man. & G. 57. There were some early decisions of the common law courts under which each party had to pay their own costs where no blame attached to anyone or in the absence of improper conduct in either party; see *Oram* v. *Sheldon* (1835), 3 Dowl. 640; *Beswick* v. *Thomas* (1837), 5 Dowl. 458; *Morland* v. *Chitty* (1833), 1 Dowl. 520; *Jones* v. *Lewis* (1841), 8 M. & W. 264; *Lambert* v. *Cooper* (1837), 5 Dowl. 547. In *Steel* v. *Rowe* (1890), 90 L. T. Jo. 10, it appears to have been held in chambers that there was no power to order costs against a claimant who did not appear, but this is contrary to *Perkins* v. *Burton*, *supra*, and is not followed in practice. It was held under the Interpleader Act (stat. (1831) 1 & 2 Will. 4, c. 58) that where the claimant appeared merely to object to the irregularity of the proceedings, and not to litigate his claim, there was not a sufficient appearance under that Act to make him liable for costs (*Grazebrook* v. *Pickford* (1842), 10 M. & W. 279). But where, though he had made no affidavit in support of his claim, he was represented by counsel on the hearing of the summons, who, after hearing the stakeholder's case, consented to an order barring the claim, and asked that no action should be brought by or against either party, it was held that there was a sufficient appearance to justify the making of an order for costs (*Rooda* v. *Gun and Shot, and Griffin's Wharves Co., Ltd.* (1873), 28 L. T. 635). These cases appear to infer that there is no power to order costs against a claimant who does not appear at all, but this is not in accordance with the present practice (see the text, *supra*).

(*h*) See pp. 621, 622, *ante*. See also *Kimberley* v. *Hickman* (1846), 1 Saund. & C. 90 (where a claimant had neglected to proceed to trial as directed by the order, on an application by the execution creditor that he should proceed to trial at the next assizes and pay the costs occasioned by his default, together with the costs of the application. Held that the claimant must pay the costs occasioned by

SECT. 7. Costs.

matter is one for the discretion of the court (*i*), and in a proper case, as on the trial of an action, the successful party may be deprived of his costs (*k*).

Costs against claimant.

1271. The claimant is only liable for costs and charges subsequent to the date of his notice of claim (*l*). Where the order directs a sale by the sheriff unless the claimant gives security within a stated time, and the security is not given till the last moment, or not at all, the claimant, though ultimately successful on the issue, must pay the sheriff's charges between the date of the order and his giving security or sale, as the case may be, since it is for his benefit that the goods were kept, but he may be entitled to have such costs included in the costs given him against the execution creditor (*m*).

Where each succeeds in part.

1272. Where the claimant succeeds in substance as against an execution creditor, though it happens that he is not entitled to all the goods claimed, he is, as a rule, entitled to the costs of the issue (*n*); and where the claimant succeeds as to part, and the execution creditor as to the other part, the costs may be divided and ordered to be taxed on that principle without reference to consideration as to which party was plaintiff and which defendant (*a*). So also on a stakeholder's interpleader, if each of the claimants succeeds in part, each party may have to pay his own costs (*b*).

Costs of proceedings to get possession of subject-matter.

1273. The costs of the successful party include the costs of an application to take the money out of court (*c*), or to obtain the subject-matter of the dispute from the stakeholder (*d*) where such an application is necessary.

Costs against execution creditor to include sheriff's charges.

1274. The successful claimant in a sheriff's interpleader is entitled to recover as costs from the execution creditor the sheriff's charges, such as possession money and expenses of sale subsequent

his default, but that the costs of the application ought to be made costs in the cause).

(*i*) R. S. C., Ord. 57, r. 15.

(*k*) *Field* v. *Rivington* (1889), 5 T. L. R. 642, C. A.; see also *Swaine* v. *Spencer* (*Stephen*) (1841), 9 Dowl. 347. As to what is good cause for depriving a successful party of his costs, see title PRACTICE AND PROCEDURE and, *inter alia*, *Sutcliffe* v. *Smith* (1886), 2 T. L. R. 881, C. A.; *Huxley* v. *West London Extension Rail. Co.* (1889), 14 App. Cas. 26, 32; *Forster* v. *Farquhar*, [1893] 1 Q. B. 564, C. A.; *Granville & Co.* v. *Firth* (1903), 72 L. J. (K. B.) 152, C. A.

(*l*) *Gaskell* v. *Sefton* (1845), 14 M. & W. 802; *Goodman* v. *Blake* (1883), 19 Q. B. D. 77.

(*m*) *Malone* v. *Ross*, [1900] 2 I. R. 586, C. A.

(*n*) *Plummer* v. *Price* (1878), 39 L. T. 657, C. A.

(*a*) *Lewis* v. *Holding* (1840), 9 Dowl. 652; *Dixon* v. *Yates* (1833), 5 B. & Ad. 313; *Clifton* v. *Davis* (1856), 6 E. & B. 392 (where the claimant succeeded as to five-sixths and the execution creditor as to the remaining sixth); overruling *Staley* v. *Bedwell* (1839), 10 Ad. & El. 145; *Cummins* v. *Kavanagh* (1890), 25 I. L. T. 24.

(*b*) *Carr* v. *Edwards* (1839), 8 Dowl. 29 (where the plaintiff to an issue claimed £183, part of a sum of £492 17*s.* 6*d.* in the hands of a stakeholder, the defendant to the issue claiming the whole amount, a verdict being found for the plaintiff for £50. Held that each party must pay his own costs).

(*c*) *Cusel* v. *Pariente* (1844), 7 Man. & G. 527; *Meredith* v. *Rogers* (1839), 7 Dowl. 596.

(*d*) *Barnes* v. *Bank of England* (1838), 7 Dowl. 319.

to the order on the interpleader summons (*e*), or to the repayment to him by the execution creditor of the amount deducted by the sheriff from the proceeds of a sale of the goods for the charges of the latter (*f*).

No power to set off costs payable in respect of an action.

1275. In a sheriff's interpleader there is no power to order costs, payable by the claimant to the execution creditor as a result of the trial of the issue, to be set off against the costs payable by the execution creditor under an order made in the original action (*g*).

Costs against a married woman.

1276. Where the unsuccessful claimant is a married woman an order may be made for payment of the costs out of her separate estate, subject to a restraint upon anticipation (*h*).

Bankruptcy before completion of sale.

1277. If the execution debtor becomes bankrupt, and the official receiver intervenes before the sale is completed, the costs of the execution creditor and of the claimant, although directed by the order made in the interpleader proceedings to be paid out of the proceeds of the sale, may not be deducted by the sheriff from the amount he must pay over to the official receiver (*i*).

Where costs reserved till trial of issue and order for issue subsequently discharged.

1278. Where the order for an issue reserved the question of costs, and subsequently the defendant to the issue obtained an order that the order for the issue be discharged unless the plaintiff to the issue took certain steps within a stated time, and, on the plaintiff's failure to take the steps, obtained a further order for payment of his costs, it was held that the order for costs was rightly made, as, notwithstanding the terms of the order of discharge, there was still jurisdiction under the first order (*k*).

Part III.—Interpleader in County Courts.

SECT. 1.—*Jurisdiction.*

Enactments.

1279. County courts have jurisdiction to grant relief by means of interpleader in proceedings which have been commenced in the county courts and also in proceedings transferred to them from the High Court. The jurisdiction in proceedings commenced in the county court was first given for the protection of high bailiffs only (*l*). This was extended by the Judicature Act, 1873 (*m*), which gave inferior courts power to grant such relief, redress, or remedy in as full and ample a manner as might and ought to be done in the High Court. But a county court is still unable to grant relief

(*e*) *Goodman* v. *Blake* (1887), 19 Q. B. D. 77.
(*f*) *Blaker* v. *Seager* (1897), 76 L. T. 392.
(*g*) *Barker* v. *Hemming* (1880), 5 Q. B. D. 609, C. A.
(*h*) *Nunn & Co.* v. *Tyson* (1901), 17 T. L. R. 624. See title HUSBAND AND WIFE, Vol. XVI., p. 374.
(*i*) *Re Rogers, Ex parte Sussex (Sheriff)*, [1911] 1 K. B. 104.
(*k*) *Wicks* v. *Wood* (1878), 26 W. R. 680.
(*l*) County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 118; see also County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 31.
(*m*) 36 & 37 Vict. c. 66, s. 89. See title COUNTY COURTS, Vol. VIII., p. 432.

SECT. 1. Jurisdiction.

Limit of scope of relief.

where the applicant (other than the high bailiff) is not at the time of the application a defendant in a county court action (*n*). Persons who merely expect to be sued cannot apply for relief in the county court as they may in the High Court (*o*).

Jurisdiction.

The jurisdiction in proceedings commenced in the county court depends upon the Judicature Act, 1873 (*p*), s. 89, the County Courts Act, 1888 (*q*), and the County Court Rules, 1903—1911 (*r*).

SECT. 2.—*Cases in which Relief may be given.*

Relief to high bailiff.

1280. The high bailiff may apply for relief whenever a claim is made to or in respect of any goods or chattels taken in execution under a process of the court, or in respect of the proceeds or value thereof (*a*).

Relief to defendant to an action.

1281. Relief may be given to a defendant in an action brought by the assignee of a debt or chose in action, who has had notice that the assignment is disputed, as to the whole or part of the debt or chose in action, by the assignor or anyone claiming from or under him, and also where the defendant in any such action, or in any other action for any debt, chose in action, money, goods or chattels, has had notice of any other opposing or conflicting claims to the whole or any part of the subject-matter of the action (*b*). The titles of the plaintiff and the claimant need not have a common origin, but may be adverse to and independent of each other (*c*).

SECT. 3.—*Conditions of Relief.*

Conditions of relief.

1282. No conditions similar to those obtaining in the High Court are attached to applications by a high bailiff, but where the applicant is a defendant, he must satisfy the registrar by affidavit that he claims no interest in the subject-matter in dispute other than for charges and costs, that he does not collude with either the plaintiff or the claimant, and that he is willing to pay or transfer the subject-matter

(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 89; County Court Rules, Ord. 27, r. 15 (1). The main reason for this limitation seems to be due not to any words of the statute itself, which are of a wide character, but to the absence of any provision of practice as to an originating summons under which such issues are raised in the High Court.

(*o*) See p. 586, *ante*.

(*p*) 36 & 37 Vict. c. 66.

(*q*) 51 & 52 Vict. c. 43, s. 120; *ibid.*, s. 156 (deposit by claimant of value of subject-matter with bailiff or security to be given); *ibid.*, s. 157 (power of court to issue summons on application by high bailiff calling parties before it to interplead).

(*r*) County Court Rules, Ord. 27, and Ord. 53, rr. 14—17. For the jurisdiction of the county court in interpleader proceedings remitted from the High Court, see title COUNTY COURTS, Vol. VIII., p. 443.

(*a*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 157.

(*b*) County Court Rules, Ord. 27, r. 15 (1). Where the application arises out of an assignment, it is essential that the applicant has had due notice thereof in writing (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); *Re New Hamburg and Brazilian Railway Co.*, [1875] W. N. 239); see p. 584, *ante*. The claims must be adverse and conflicting in the sense of being claims to the same thing (*Greatorex* v. *Shackle*, [1895] 2 Q. B. 249); and see p. 586, *ante*.

(*c*) County Court Rules, Ord. 27, r. 15 (3); see p. 584, *ante*.

into court or dispose of it as the court may direct (*d*). Copies of the affidavits must be lodged with the registrar for the plaintiff and claimant (*e*).

SECT. 3. Conditions of Relief.

SECT. 4.—*The Claim.*

SUB-SECT. 1.—*How and when made.*

Practice in interpleader by high bailiff.

1283. Where a claim arises out of process of the court it must be made in writing (*f*). If the claim is not admitted by the execution creditor within four days of his receipt of notice of the claim sent to him by the high bailiff, and the claimant persists in his claim, the high bailiff shall apply for an interpleader summons to be issued (*g*).

Particulars.

1284. Five clear days at least before the return day the claimant must deliver to the high bailiff, or leave at the office of the registrar, two copies of the particulars of the goods or chattels claimed, and of the grounds of his claim, with his full name, address, and description (*h*).

Where the claim is by a landlord for rent, particulars must be given of the amount, period, and premises in respect of which it is claimed (*i*).

Extent of particulars to be given.

1285. Particulars which merely state that the goods claimed are the property of the claimant without giving the grounds for the claim are insufficient (*j*), but particulars giving the date of and parties to an assignment under which the claim is made are a sufficient compliance with the rule (*k*). The goods claimed need not be specifically set out (*l*), and slight errors in the particulars will not invalidate their sufficiency (*m*).

Where particulars given are insufficient.

1286. Where the particulars are insufficient or not delivered in time, the judge should either amend them or order a new summons to be issued, as he is bound to adjudicate upon the claim upon the merits (*n*). Where the judge erroneously decides that the particulars are insufficient and orders the claimant to pay costs, the High Court may order him to adjudicate upon the claim, but has no jurisdiction to reverse the order as to costs (*o*).

(*d*) County Court Rules, Ord. 27, r. 15 (2); *ibid.*, Form 226; see p. 594, *ante*.
(*e*) *Ibid.*
(*f*) County Court Rules, Ord. 27, r. 1 (1).
(*g*) *Ibid.*, r. 3.
(*h*) *Ibid.*, r. 5. One of the copies must forthwith be sent by the high bailiff by post to the execution creditor (*ibid.*).
(*i*) *Ibid.* As to a landlord's claim for rent where process has been issued, see title COUNTY COURTS, Vol. VIII., p. 563.
(*j*) *R.* v. *Chilton* (1850), 15 Q. B. 220; *Re Cullum* v. *Ross*, *Ex parte Tanner* (1850), 19 L. J. (Q. B.) 319; see also *Richardson* v. *Wright* (1875), L. R. 10 Exch. 367 (where the court was equally divided).
(*k*) *R.* v. *Richards* (1851), 20 L. J. (Q. B.) 351.
(*l*) *Heslop* v. *M'George* (1851), 18 L. T. (o. s.) 109; *R.* v. *Stapylton* (1851), 21 L. J. (Q. B.) 8.
(*m*) *E.g.*, *Re Hardy* v. *Walker*, *Ex parte M'Fee* (1853), 9 Exch. 261 (where the address given was "Elizabeth Street" instead of "Elizabeth Terrace").
(*n*) *Beswick* v. *Boffey* (1854), 9 Exch. 315.
(*o*) *R.* v. *Richards*, *supra*; *Churchward* v. *Coleman* (1866), L. R. 2 Q. B. 18; but see *Whitehead* v. *Procter* (1858), 3 H. & N. 532. The High Court may also

SECT. 4. The Claim.

Where damages are claimed.

1287. Where damages are claimed by the claimant from the execution creditor or from the high bailiff in respect of the seizure, the particulars of the claim to the goods must also contain a statement of the amount claimed for damages and the grounds of the claim (*p*).

Where such a claim is made, the high bailiff and the execution creditor, or either of them, may pay into court a sum of money in satisfaction of the claim, and the payment so made has the same effect as if the proceeding were in an action in which the claimant was plaintiff and the high bailiff or execution creditor defendant (*q*).

Practice in interpleader by defendant.

1288. Where the interpleader proceedings are taken by a defendant to an action, no provision has been made that notice of the claim in writing shall be given as in the case of interpleader by the high bailiff; but where the claimant persists in his claim, he must, five clear days at least before the return day of the interpleader summons, leave at the registrar's office three copies of particulars of the grounds of his claim, one of which the registrar must send to the plaintiff, and the other to the defendant (*r*).

Practice in proceedings transferred from the High Court.

1289. Where an order is made in the High Court on an interpleader summons issued at the instance of the sheriff, transferring the proceedings to a county court, the claimant must, at least five clear days (*s*) before the day fixed by the county court for the hearing of the proceedings so transferred, lodge with the registrar two copies of the particulars of the goods or chattels he claims and of the grounds of his claim, one of which the registrar must forthwith send by post to the execution creditor (*t*), but in such particulars no claim for damages will be allowed (*a*).

SUB-SECT. 2.—*Admission or Withdrawal.*

Where execution creditor admits the claim.

1290. If within four days after receipt of notice of the claim the execution creditor gives notice (*b*) to the high bailiff that he admits

prohibit the county court judge from proceeding on the original plaint (*Re Hardy* v. *Walker, Ex parte M'Fee* (1853), 9 Exch. 261).

(*p*) County Court Rules, Ord. 27, r. 8, as altered by County Court Rules, 1911, Ord. 27, r. 8 (2); *ibid.*, Form 211. Where the claimant has not claimed damages before the issue of the interpleader summons, but claims them in his particulars, he may be ordered to pay the costs of any adjournment which may be necessary to enable the execution creditor or the high bailiff to prepare his defence to the claim so made (County Court Rules, Ord. 27, r. 8 (2), May, 1911).

(*q*) County Court Rules, Ord. 27, r. 10. See title COUNTY COURTS, Vol. VIII., p. 493.

(*r*) County Court Rules, Ord. 27, r. 15 (5); *ibid.*, Form 230. Non-compliance with this rule may be waived where all parties consent, or without consent if the judge directs.

(*s*) In a proper case the court will reduce the period and expedite the hearing (County Court Rules, Ord. 33, r. 13).

(*t*) County Court Rules, Ord. 33, r. 10. By consent of all parties, or without such consent, if the judge so directs, the interpleader claim may be tried although this rule has not been complied with (*ibid.*, Form 211).

(*a*) County Court Rules, Ord. 33, r. 11. Before this rule it had been held that the county court judge could not allow a claim for damages to be added (*Oliver* v. *Lewis*, [1889] W. N. 224).

(*b*) For form, see County Court Rules, Form 204A.

the title of the claimant, he is only liable to the high bailiff for possession fees or expenses incurred by the latter prior to the notice of admission being received, and, where necessary, these may be recovered by the high bailiff upon an application to the court in writing, three clear days' notice thereof being given to the execution creditor (*c*).

Withdrawal by high bailiff

1291. The high bailiff on receipt of the notice of admission may withdraw from possession, and apply in writing to the court for an order protecting him from any action in respect of the seizure and possession of the subject-matter of the claim. Three clear days' notice of any such application must be given by the bailiff to the claimant, who may attend the hearing. The judge may make such order as to protection and costs as may be just and reasonable (*d*).

Where no admission by execution creditor or withdrawal by claimant.

1292. If there is no such admission and the claimant does not withdraw, the high bailiff must issue an interpleader summons, and then, if before the return day the claimant files a notice of withdrawal and gives notice to the execution creditor, or the execution creditor files an admission of the title of the claimant and gives notice to the claimant, the subject-matter of the dispute or money paid into court will be dealt with and disposed of as if no claim had been made or the execution had been withdrawn, as the case may be, and the judge may make such order as to costs and charges as may be just and reasonable (*e*).

Abandonment by claimant where applicant is the defendant to an action.

1293. Where the interpleader proceedings are commenced by a defendant and the claimant desires to abandon his claim, he must, five clear days at least before the return day of the interpleader summons, leave at the registrar's office three copies of a notice of relinquishment, one of which is sent by the registrar to the plaintiff and another to the defendant (*f*). Where such a notice is filed, the judge, on the return of the interpleader summons, may make an order declaring the claimant and all persons claiming under him for ever barred against both the plaintiff and defendant in the action, and all persons claiming under them, and may also make such order against the claimant as to costs incurred by the other parties before receipt of notice of relinquishment as may be just (*g*).

SUB-SECT. 3.—*Deposit or Security by Claimant.*

Deposit to be made by claimant or security given.

1294. Where a claim is made to or in respect of goods taken in execution, the high bailiff must forthwith send to the claimant

(*c*) County Court Rules, Ord. 27, r. 1 (2). Formerly the fees could only be recovered by means of an action (*Thomas* v. *Peek* (1888), 20 Q. B. D. 727). The application must be in writing and intituled in the matter of the execution (County Court Rules, Ord. 27, r. 1 (2)).

(*d*) County Court Rules, Ord. 27, r. 2.

(*e*) *Ibid.*, r. 3.

(*f*) *Ibid.*, r. 15 (5); *ibid.*, Form 230.

(*g*) *Ibid.*, r. 15 (7), (b).

SECT. 4. **The Claim.**

a notice (*h*), requiring him to make a deposit or give security (*i*), and also a notice of the claim to the execution creditor (*k*).

Amount.

The claimant may deposit with the bailiff, either the amount of the value of the goods he claims (*l*), to be paid by the bailiff into court to abide the decision on the claim, or the amount of the costs for keeping possession until the decision (*m*), or instead of deposit he may give to the bailiff security for the value of the goods claimed in the form of a bond with sureties (*n*).

Where claim made under bill of sale.

1295. Where a claimant, whose title under a bill of sale was admitted, deposited the amount of the judgment debt and costs, and not the value of the goods, and the high bailiff withdrew from possession without consulting the execution creditor, it was held that the high bailiff ought not to have withdrawn, and that the court had, on an application by the execution creditor, power to order the high bailiff to retake possession, and to order a sale of the goods, if there was evidence that the proceeds of such sale might realise sufficient to discharge the bill of sale and leave a surplus towards the judgment debt and costs (*o*).

Possession fees after date of deposit.

1296. Where a claimant deposited more than sufficient to cover the judgment debt and costs, though less than the value of the goods, and the execution creditor before the return day of the summons admitted the claimant's title, it was held that the bailiff was not entitled to possession fees after the date of the deposit, since, having taken the amount deposited, which he had no right to do except on the assumption that it represented the amount of the value of the goods, he ought to have withdrawn from possession and could not afterwards be heard to say that it did not represent the value (*p*).

Where there is a second execution.

1297. Where an amount equal to the value of the goods is paid into court, and thereupon the high bailiff withdraws from possession, the goods may be seized again by another execution creditor. In such a case the remedy of the original execution creditor is against

(*h*) For form, see County Court Rules, Form 205. Formerly no such request was necessary before a sale could take place (*Cramer* v. *Matthews* (1881), 7 Q. B. D. 425).

(*i*) County Court Rules, Ord. 27, r. 1 (3).

(*k*) *Ibid.*, r. 1 (1); *ibid.*, Form 203A.

(*l*) The value will be fixed by appraisement in case of dispute (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 156). "Dispute" means a dispute between the claimant and the execution creditor (*Miller & Co.* v. *Solomon*, [1906] 2 K. B. 91).

(*m*) These fees are set out in Sched. B to the Treasury Order regulating court fees, dated 30th December, 1903. Where the high bailiff levied under three warrants upon different goods of the debtor on the same premises, and possession under all the warrants was held by the same man, he was held to be entitled to possession money under each warrant (*Re Morgan, Ex parte Board of Trade*, [1904] 1 K. B. 68).

(*n*) County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 156, 108, and County Court Rules, Ord. 29; *ibid.*, Forms 235, 236.

(*o*) *Miller & Co.* v. *Solomon*, *supra*.

(*p*) *Newsum, Sons & Co., Ltd.* v. *James*, [1909] 2 K. B. 384. It is somewhat difficult to reconcile this case with *Miller & Co.* v. *Solomon*, *supra*, on the question of principle as to how much should be deposited as security. The cases largely depend upon the special facts.

the money in court and not against the goods (*q*). Where the value of the goods deposited is less than the amount of the judgment debt, and the money in court is paid out to the execution creditor on the claimant failing to establish his claim, the execution creditor is not entitled to the value of the goods deposited a second time by the same claimant on a second execution upon the same judgment being levied by the execution creditor, since he has elected to accept the money deposited in the first instance in lieu of the goods (*r*).

SECT. 5.—*Payment into Court.*

Payment into court by bailiff or defendant.

1298. In interpleader proceedings by the high bailiff, where the claimant deposits with the bailiff the amount of the value of the goods claimed, or fails to deposit or give security and the bailiff sells the goods, the amount of the deposit or proceeds of the sale must be paid into court by the bailiff to abide the decision of the judge upon the claim (*s*), and any money paid into court under the execution must be retained by the registrar until the claim has been adjudicated upon (*t*). In an interpleader by a defendant, the subject-matter of the action and claim must be brought into court by the defendant on filing his affidavit of disinterestedness, or at any time after the issue of the summons (*u*).

SECT. 6.—*Sale by High Bailiff.*

Duty to sell.

1299. Where no deposit is made by the claimant, nor security given, the high bailiff must sell the goods and pay the proceeds into court to abide the decision of the judge (*v*).

Effect of sale.

Where the real owner claims the goods, but makes no deposit nor gives security, and the high bailiff thereupon sells under this provision, the sale conveys a good title to the goods although the judgment debtor is not the true owner (*a*). But where the claimant is not the real owner and the real owner makes no claim to the goods, the purchaser does not get a good title as against the real owner (*b*).

(*q*) *Wells* v. *Hughes*, [1907] 2 K. B. 845; S. C., 23 T. L. R. 733, C. A.

(*r*) *Haddow* v. *Morton*, [1894] 1 Q. B. 565, C. A. The taking the money out of court was held to be an election to accept the money in lieu of the goods, and the execution creditor was therefore estopped from afterwards denying that as against himself the goods were the claimant's; and see title ESTOPPEL, Vol. XIII., pp. 358, 365. The question as to what the result would have been if the judgment creditor had seized the goods the second time on another judgment was left open; compare *Kolchie* v. *Golden Sovereigns, Ltd.*, [1898] 2 Q. B. 164, C. A.

(*s*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 156.

(*t*) County Court Rules, Ord. 27, r. 5.

(*u*) *Ibid.*, r. 15 (6).

(*v*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 156. He need not first apply for an interpleader summons (*Cramer* v. *Matthews* (1880), 7 Q. B. D. 425).

(*a*) *Goodlock* v. *Cousins*, [1897] 1 Q. B. 558, C. A.; see also *Cramer* v. *Matthews*, *supra*, at p. 433.

(*b*) *Crane & Sons* v. *Ormerod*, [1903] 2 K. B. 37.

SECT. 6. Sale by High Bailiff.

None of the provisions of the County Courts Acts (*c*) or Rules (*d*), nor the preceding principles, relieve the high bailiff from liability in conversion if he sells goods under an execution which are not the goods of the execution debtor, and if the true owner has a right to the possession of those goods (*e*).

Power to delay sale.

1300. The high bailiff may in his discretion delay selling the goods until the judge has adjudicated upon the claim, and where he does so he may be allowed, for the keeping of such continued possession, such costs out of pocket only as the judge may order (*f*).

Sale where claim made under a bill of sale.

1301. Where the claimant alleges he is entitled to the goods or chattels seized by the high bailiff under a bill of sale, or otherwise by way of security for debt, the judge may order a sale of the whole or part of the subject-matter of the claim, and direct the application of the proceeds in such manner and upon such terms as may be just (*g*). A duplicate of such order for sale must be given by the registrar to the high bailiff, who must forthwith sell the goods and, after deducting the expenses of the sale, taxes, and rent, if any, directed by the order to be paid, pay the balance into court to be applied by the registrar in accordance with the order (*h*). The costs of an application for sale under the rule are borne as between the parties to the application as the judge directs (*i*).

Sale in proceedings transferred from High Court.

1302. In proceedings transferred from the High Court, where the usual order has been made for withdrawal by the sheriff on payment by the claimant of the value of the goods claimed, and for sale in default, and such order provides that such directions for sale shall be subject to any order made by the court before sale directing the sheriff to remain in possession or hand over possession to the high bailiff, any party to the proceeding, including the sheriff, may, on notice to the other parties (*j*), apply (*k*) for a postponement of the sale and to expedite the hearing of the proceeding. The judge may thereupon make the order asked for upon such terms as to possession money or other charges as may be prescribed by the order of transfer, or if none, then upon such

(*c*) County Courts Act, 1888 (51 & 52 Vict. c. 43); County Courts Act, 1903 (3 Edw. 7, c. 42).

(*d*) County Court Rules, 1903—1911.

(*e*) *Jelks* v. *Hayward*, [1905] 2 K. B. 460 (where furniture was let on hire by the claimants to the execution debtor, under an agreement whereby the claimant could immediately retake possession upon its being taken in execution, and the claimants were unaware of the seizure).

(*f*) County Court Rules, Ord. 27, r. 7.

(*g*) *Ibid.*, r. 13 (1). See *Miller & Co.* v. *Solomon*, [1906] 2 K. B. 91; and pp. 632, 633, *ante*.

(*h*) County Court Rules, Ord. 27, r. 13 (2); *ibid.*, Form 212A. The costs of an application for sale under this rule are in the discretion of the judge (*ibid.*, Ord. 27, r. 13 (3), May, 1911).

(*i*) *Ibid.*, as altered by the County Court Rules, 1911.

(*j*) Where the application is made by one of the parties to the proceeding notice must be given to the London agent of the under-sheriff.

(*k*) The application is made under County Court Rules, Ord. 12, r. 11. See title COUNTY COURTS, Vol. VIII., p. 507.

terms as may be just and reasonable, and may also expedite the hearing (*l*). SECT. 6. Sale by High Bailiff.

SECT. 7.—*The Application.*

SUB-SECT. 1.—*In General.*

1303. In claims arising out of process of the court, where there is neither an admission of the claimant's title by the execution creditor within the time limited, nor withdrawal by the claimant, the high bailiff may, before or after any action has been brought against him, apply to the registrar for a summons calling the execution creditor and claimant before the court (*m*). The application must be made to the court of the district where the levy has been made (*n*). By high bailiff.

1304. The summons may be issued without leave of the judge (*o*), and service must be effected as in the case of an ordinary summons (*p*). The summons must be served on the solicitor of any party who acts by a solicitor (*q*). Where the claimant has failed to make a deposit or give security, the time of service may, if the high bailiff so desires, by leave of the court, be such as will obtain a speedy decision on the claim (*r*). Practice.

1305. Where the defendant to an action is an applicant for relief he may within five days of the service of the summons in the action apply to the registrar for a summons for relief against the claimant (*s*). On being satisfied by affidavit that the necessary conditions for relief to be granted exist (*t*), the registrar must issue an interpleader summons for service on the claimant (*a*), returnable as soon as conveniently may be, and must annex thereto a copy of the original summons and of the affidavit in support. Notice of the issue of the interpleader summons must be given to the plaintiff and defendant to the original action (*b*). By defendant.

SUB-SECT. 2.—*Claim by Execution Creditor for Damages.*

1306. Where damages are claimed by the execution creditor against the high bailiff for negligence or misconduct or other cause arising out of the execution of the process, the execution creditor must, at least five clear days before the return day of the summons, give notice in writing to the registrar and high bailiff stating the Where damages for negligence claimed by execution creditor.

(*l*) County Court Rules, Ord. 33, r. 13 (1).
(*m*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 157; County Court Rules, Ord. 27, r. 12; *ibid.*, Forms 206—210.
(*n*) County Court Rules, Ord. 27, r. 12.
(*o*) *Ibid.*, r. 11.
(*p*) *Ibid.*, r. 4. See title COUNTY COURTS, Vol. VIII., p. 468. It has been held in Ireland that the county court has no jurisdiction to pronounce a decree upon an interpleader process where service was effected out of the jurisdiction (*Spence* v. *Parkes*, [1900] 2 I. R. 619).
(*q*) County Court Rules, Ord. 27, r. 11.
(*r*) *Ibid.*, r. 4.
(*s*) *Ibid.*, r. 15 (1).
(*t*) See p. 628, *ante*.
(*a*) For Form, see County Court Rules, Form 227.
(*b*) County Court Rules, Ord. 27, r. 15 (4); *ibid.*, Forms 228, 229.

SECT. 7. The Application.

amount and grounds of the claim, and, on the hearing of the summons, may apply to the judge to adjudicate upon the claim. Such a claim is to be deemed a claim in interpleader for the purpose of fees and costs (*c*). The high bailiff may pay money into court in satisfaction of the claim, as if the proceeding were an action by the claimant against him (*d*). Where the claim for damages is not made until after the order has been made on the summons in respect of the goods, no action can be maintained upon it (*e*).

SUB-SECT. 3.—*Transferred Proceedings.*

Practice in transferred proceedings.

1307. Where the proceedings have been transferred from the High Court, the claimant (*f*) must lodge (*g*) with the registrar the order of transfer, or a sealed duplicate or copy thereof, office copies of all affidavits filed on the application to the High Court, a copy of any issue directed to be delivered between the parties, a statement in writing giving the names and addresses of the parties and their solicitors, and setting out concisely the nature of the proceedings transferred, together with a request to enter the proceedings for hearing. The registrar must then enter the proceedings and give notice to the parties of the time and place for the hearing, and to the London agent of the under-sheriff, where the proceedings have been taken by the sheriff (*h*).

SECT. 8.—*The Order.*

SUB-SECT. 1.—*Non-Appearance of Parties.*

Non-appearance of plaintiff.

1308. In interpleader proceedings by a defendant, if on the return day of the interpleader summons the plaintiff in the action does not appear, the action and interpleader summons must be struck out, and the judge may make such order as to costs as may be just (*i*).

Non-appearance of claimant.

If the claimant does not appear, the judge must hear and determine the action as between the plaintiff and defendant, and may make an order declaring the claimant and persons claiming under him for ever barred against the defendant and persons claiming under him, and such order as to costs against the claimant as may

(*c*) County Court Rules, Ord. 27, r. 9; *ibid.*, Form 222.

(*d*) *Ibid.*, r. 10. See title COUNTY COURTS, Vol. VIII., p. 493.

(*e*) *Death* v. *Harrison* (1870), L. R. 6 Exch. 15. This was a decision under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 31. Under the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 118, it was a moot point whether the jurisdiction of the judge was not confined to the determination of the right to the goods in dispute or whether he could go into the question of damages for trespass.

(*f*) If the claimant fails to take the necessary steps, any other party to the proceedings, including the sheriff, may do so.

(*g*) If no time is limited by the order of transfer, the lodgment must be effected within seven days from its date.

(*h*) County Court Rules, Ord. 33, r. 9. Ten clear days' notice at least must be given, unless shorter notice is directed by the order of transfer, or the judge or registrar (*ibid.*). The court may expedite the hearing and may reduce the length of notice (*ibid.*, r. 13 (2)).

(*i*) *I bid.*, Ord. 27, r. 15 (7) (a).

SECT. 8. The Order.

be just. But the order barring the claim as against the defendant does not affect the rights of the plaintiff and claimant between themselves (*k*).

Non-appearance of defendant.

If the defendant alone does not appear, the judge must hear the cases of the plaintiff and claimant and give such judgment thereon as shall finally determine the rights and claims of all parties, but no order shall be made in favour of the claimant as against the defendant except at the claimant's request (*l*).

SUB-SECT. 2.—*Stay of Action.*

Where applicant is defendant to an action.

1309. Where the applicant for relief is the defendant to an action, the registrar upon issuing the interpleader summons must adjourn the trial of the action to the day on which the interpleader summons is made returnable, and give notice to the plaintiff and defendant of the adjournment (*m*).

Where applicant is the high bailiff.

1310. Where the applicant is the high bailiff, any action which has been brought in any court in respect of the claim or of any damage arising out of the execution of the process must be stayed upon the issue of the interpleader summons (*n*). But an action by the claimant against a purchaser of the goods taken in execution will not be stayed, since there is no power to bring him before the court in the proceedings (*o*).

SUB-SECT. 3.—*Adjudication on Claim.*

Judge must adjudicate on the claim as to damages.

1311. On the return of the summons issued by the high bailiff, if there is no jury, the judge must adjudicate upon the claim made, and make such order in respect of the claim and costs of the proceedings as he thinks fit (*p*). He must also adjudicate between the parties, or either of them, and the high bailiff on any claim in respect of any damage or damages arising out of the execution of the process by the high bailiff (*q*), and may make such order in respect of any such claim, and in respect of the costs of the proceedings, as may seem fit (*r*). The order made must include directions as to the disposal of the money paid into court (*s*), and is final and conclusive as between the parties, or as between

(*k*) County Court Rules, Ord. 27, r. 15 (7) (b). As to where the claimant has filed notice of relinquishment of his claim before the return day, see p. 631, *ante*.

(*l*) County Court Rules, Ord. 27, r. 15 (7) (c).

(*m*) *Ibid.*, r. 15 (4); *ibid.*, Forms 228, 229.

(*n*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 157.

(*o*) *Hills* v. *Renny* (1880), 5 Ex. D. 313, C. A.

(*p*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 157.

(*q*) By virtue of these words the county court judge has jurisdiction to adjudicate upon all claims of whatever amount arising in the way described in this section (*Smith* v. *Benskin* (1893), 94 L. T. Jo. 285).

(*r*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 157. As to the liability for wrongful seizure, see p. 634, *ante*, and, generally, title EXECUTION, Vol. XIV., pp. 28 *et seq.*

(*s*) County Court Rules, Ord. 27, r. 14. A minute of the order must be entered in the minute book, but need not be drawn up and served unless any of the parties require it or the court orders it. Forms, if drawn up, *ibid.*, Forms 213—220, 223—225.

SECT. 8. The Order.

them, or either of them, and the high bailiff, unless appealed from (*t*).

Order as to fees.

1312. The judge must also adjudicate upon any claim of the high bailiff for fees, and may order payment of such fees by the claimant or execution creditor as he thinks just (*u*).

Power of judge where applicant is defendant to an action.

1313. In interpleader proceedings by a defendant, the judge may make all orders, including orders as to the disposal of the subject-matter of the dispute paid or brought into court and as to costs, as may be just and reasonable (*a*).

Order in proceedings transferred from High Court.

1314. In proceedings transferred from the High Court the order must also contain directions as to the disposal of the money in court, or in the sheriff's hands, and order the sheriff to deal with the money in his hands accordingly (*b*).

Damages against high bailiff.

1315. Damages ought to be awarded against the high bailiff where the claimant can prove substantial loss or injury (*c*).

Enforcement of order.

1316. The order of the judge may be enforced in the same manner as any order in an action in the court (*d*).

SECT. 9.—*Trial.*

Discovery and mode of trial.

1317. The rules relating to discovery and to the mode of trial of actions in the county court apply, with the necessary modifications, to interpleader proceedings (*e*). In interpleader issues arising out of process the claimant is the plaintiff and the execution creditor the defendant (*f*). Trial may be by a jury at the instance of either party (*g*).

In proceedings transferred from the High Court.

1318. In proceedings transferred from the High Court, the trial is to be in the manner and under the conditions prescribed by the order of transfer. If no directions are given by it, any of the parties, including the sheriff, may apply to the county court for directions. Subject to any directions being thus given, the

(*t*) County Courts Act, 1888 (51 & 52 Vict. c. 42), s. 157.
(*u*) County Court Rules, Ord. 27, r. 6.
(*a*) *Ibid.*, r. 15 (8).
(*b*) *Ibid.*, Ord. 33, r. 18; *Discount Banking Co. of England and Wales* v. *Lambarde*, [1893] 2 Q. B. 329, C. A. As in the case of an order in proceedings commenced in the county court, the order need not be drawn up (County Court Rules, Ord. 32, r. 18; *ibid.*, Forms 213, 214).
(*c*) *E.g.*, *London, Chatham, and Dover Rail. Co.* v. *Gaslight and Coke Co.* (1899), 80 L. T. 119 (where two gas stoves of the value of £18 18*s.*, exempt from execution, were seized and sold for £1 14*s.*); *Jelks* v. *Hayward*, [1905] 2 K. B. 460 (where furniture let out on hire was seized and sold by the high bailiff, who was held liable for damages for conversion); see also *De Coppett* v. *Barnett* (1901), 17 T. L. R. 273, C. A.
(*d*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 157. See title COUNTY COURTS, Vol. VIII., p. 550.
(*e*) County Court Rules, Ord. 27, r. 15 (8). See title COUNTY COURTS, Vol. VIII., pp. 513, 528. As to the law of discovery in general, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 35 *et seq.*
(*f*) County Court Rules, Ord. 27, r. 4.
(*g*) *Ibid.*, Ord. 22, r. 3.

proceedings are to be tried by the judge without a jury, and the ordinary procedure in the trial of an action applies (*h*). An application may be made to expedite the hearing of the proceedings (*i*), and where it is granted the judge may also order the hearing to take place at any convenient court of which he is judge (*j*).

SECT. 9. Trial.

SECT. 10.—*Appeal.*

1319. A right of appeal to the High Court is given where any party is dissatisfied with the determination or discretion of the judge in point of law or equity, or upon the admission or rejection of any evidence, except that where the money claimed or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed £20, there is no appeal as of right, but only if the judge thinks it reasonable and proper that an appeal should be allowed and grants leave to appeal (*k*).

Appeal to the High Court.

1320. Where the claimant deposits a smaller sum than £20 as the appraised value of the goods, he cannot claim the right to appeal on the ground that the real value is more than £20, and that the smaller amount deposited was sufficient to satisfy the judgment (*l*). Where the value of the goods seized exceeds £20 there is an appeal without leave, though the judgment debt is less than £20, and the claimant has paid the amount of the judgment debt into court to prevent a sale (*m*). Where the value is less than £20, but there is joined to the claim to the goods a claim, exceeding £20, for damages against the execution creditor upon which judgment is given for a smaller amount than £20, the execution creditor cannot appeal without leave (*n*), though the claimant can appeal so far as the amount of the damages is concerned (*o*).

Where less than £20 deposited.

1321. Where the claim made is a claim by a landlord for rent to a greater amount than £20, and the landlord appears on the hearing of the summons, he, as well as the other parties, has a right of appeal (*p*). The high bailiff cannot appeal against the finding on the issue, as he is not a party (*q*).

Landlord's right of appeal.

(*h*) County Court Rules, Ord. 33, r. 12. For proceedings on trial generally, see title COUNTY COURTS, Vol. VIII., p. 528.

(*i*) County Court Rules, Ord. 33, r. 13 (1).

(*j*) *Ibid.*, r. 13 (2). Notice of the time and place must be given by the registrar to the parties, and to the registrar of the other court, to whom also all papers relating to the matter must be transmitted. After the hearing, the papers are returned to the registrar of the original court with a minute of the order made. The order is here settled, filed, entered and proceeded upon in the original court as if the hearing had taken place there (*ibid.*).

(*k*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120. As to appeals from county courts generally, see title COUNTY COURTS, Vol. VIII., p. 601.

(*l*) *White* v. *Milne & Co.* (1887), 58 L. T. 225.

(*m*) *Vallance* v. *Nash* (1858), 2 H. & N. 712.

(*n*) *Lumb* v. *Teal & Co.* (1889), 22 Q. B. D. 675.

(*o*) *Dreesman* v. *Harris* (1854), 9 Exch. 485.

(*p*) *Foulger* v. *Taylor* (1860), 5 H. & N. 202.

(*q*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120; see *Smith* v. *Darlow* (1884), 26 Ch. D. 605, C. A.; *Temple* v. *Temple* (1894), 63 L. J. (Q. B.) 556,

SECT. 10. Appeal.

Appeal as to costs.

1322. The incidence of the sheriff's or high bailiff's charges is a matter of law, and is, therefore, a proper subject of appeal (*r*). On a successful appeal the High Court has jurisdiction to allow the costs of the trial below as well as of the appeal (*s*).

Appeal in transferred proceedings.

1323. In proceedings transferred from the High Court to the county court there is an appeal to the divisional court, and from that court, by leave, to the Court of Appeal, and ultimately to the House of Lords (*t*).

SECT. 11.—*Costs.*

Scale of costs.

"Subject-matter."

1324. The scale of costs applicable is governed by the value of the subject-matter of the dispute (*a*). For this purpose the "subject-matter" in interpleader proceedings means, (1) in the case of a claimant, the amount of the value of the goods his claim to which is allowed, *plus* the amount of the damages, if any, awarded; (2) in the case of an execution debtor, the amount of the value of the goods seized, *plus* the amount of the damages, if any, claimed, and (3) in the case of a high bailiff, the amount of the damages claimed (*b*).

Where the deposit made by the claimant is under £50, and the judge decides in the claimant's favour, and holds that the goods were of greater value than £50, the claimant is entitled to have his costs taxed on scale C (*c*).

Costs in transferred proceedings.

1325. In proceedings transferred from the High Court, the rights of the sheriff to his proper charges cannot be prejudiced nor affected by any order of the county court, but the judge may direct by whom such charges shall be paid (*d*), and may also direct that the sheriff shall have his costs of the proceedings in the High Court, and may direct by which party such costs shall be paid (*e*).

There is no power to order the sheriff to pay the costs of the issue as he is not a party to it. If such an order has been made, the sheriff's proper course is not to appeal against it, but to apply for a prohibition (*f*).

Bailiff's allowances.

Where the goods are handed over by the sheriff to the high bailiff in pursuance of an order of the county court, the latter may

cited in note (*e*), *infra*. Possibly he may appeal against the decision on the claim for damages against him.

(*r*) *Goodman* v. *Blake* (1887), 19 Q. B. D. 77.

(*s*) *Gage* v. *Collins* (1867), L. R. 2 C. P. 381.

(*t*) *Thomas* v. *Kelly* (1888), 13 App. Cas. 506. The Court of Appeal has jurisdiction under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45, which is not taken away by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 66), s. 20 (*ibid.*, approving *Crush* v. *Turner* (1878), 3 Ex. D. 303, C. A.). See also titles COUNTY COURTS, Vol. VIII., pp. 607 *et seq.*; COURTS, Vol. IX., pp. 59 *et seq.*

(*a*) As to costs generally, see title COUNTY COURTS, Vol. VIII., p. 578.

(*b*) County Court Rules, Ord. 53, r. 15.

(*c*) *Studham* v. *Stanbridge*, [1895] 1 Q. B. 870; commenting on *Brown* v. *Lilley* (1891), 7 T. L. R. 427; compare *White & Co.* v. *Milne* (1887), 58 L. T. 225.

(*d*) County Court Rules, Ord. 33, r. 14.

(*e*) *Temple* v. *Temple* (1894), 63 L. J. (Q. B.) 556. As to prohibition, see title CROWN PRACTICE, Vol. X., pp. 141 *et seq.*

(*f*) County Court Rules, Ord. 33, r. 17.

be allowed reasonable charges for keeping possession, not exceeding the proper charges of a sheriff. For conducting the sale, if any, he is entitled to the same charges as in the case of an execution issued by the county court (*g*).

Costs in Chancery Division before transfer.

The costs of interpleader proceedings in the Chancery Division before the order of transfer to the county court, and of the transfer, are, subject to any order made in the High Court, in the discretion of the county court judge, and may be taxed on the High Court or county court scale as he thinks just.

Costs in county court.

The costs of the proceedings in the county court are taxed on such county court scale as he thinks just (*h*)

Part IV.—Interpleader in the Liverpool Court of Passage.

Practice identical with that in the High Court.

1326. The rules relating to the practice in interpleader proceedings in the Court of Passage of the city of Liverpool (*i*) are almost identical in terms with those in force in the High Court.

No power to order service out of the jurisdiction.

1327. An interpleader summons may be served out of the jurisdiction of the court anywhere in England and Wales without leave, but there is no power to serve it out of the jurisdiction beyond these limits (*k*).

Appeal.

1328. An appeal lies from every decision of the registrar to the presiding judge (*l*), and from the presiding judge to the Court of Appeal in every case by special leave of the presiding judge or of the Court of Appeal (*m*).

Costs.

1329. The rules and principles governing the allowance of costs are the same as in the High Court. There exists, however, a practice by which, in small cases, the sergeant-at-mace does not wait for the expiration of the four days after giving notice to the execution creditor before issuing the summons, but instead the summons is issued at once and returnable by special leave the day after service. At the request of any party the summons may be adjourned, but if, on the return of the summons, the claim is admitted or withdrawn, costs are usually not given to either the execution creditor or the claimant.

(*g*) County Court Rules, Ord. 33, r. 15.

(*h*) *Ibid.*, r. 16.

(*i*) See as to constitution and general jurisdiction, title COURTS, Vol. IX., pp. 173 *et seq.* The rules were made under the Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37), s. 8 of which gives them statutory force. They came into operation on 1st October, 1903. The order relating to interpleader is Ord. 57, as in the case of the rules in force in the Supreme Court. See p. 581, *ante*.

(*k*) Liverpool Court of Passage Procedure Act, 1853 (16 & 17 Vict. c. xxi.), s. 67.

(*l*) Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37), s. 9; and see title COURTS, Vol. IX., p. 173.

(*m*) Court of Passage Rules, Ord. 57, r. 11 (see note (*i*), *supra*); *Coates* v. *Moore*, [1903] 2 K. B. 140, C. A.

PART V. Interpleader in the Salford Hundred Court.

Part V.—Interpleader in the Salford Hundred Court.

Enactments.

1330. The interpleader jurisdiction of the Salford Hundred Court depends upon the Salford Hundred Court of Record Act, 1868 (*n*). No rules relating specifically to interpleader have been made under the provisions of that Act which enable rules to be made (*o*), but the Act provides that in any case not expressly provided for therein, or by rules of court for the time being in force, the general principles of practice in the superior courts shall be applicable to actions and proceedings in the court, and by a rule (*p*) it further provides that the practice, where no rules and orders apply to the contrary, shall be as nearly conformable as may be to the rules and practice of the High Court.

Where relief given.

1331. The court gives relief (1) to its head bailiff or any of his officers where any claim to or in respect of goods or chattels taken or intended to be taken in execution under the process of the court, or to or in respect of the proceeds or value thereof, is made by any landlord for rent, or by any person not being the party against whom such process has issued (*q*); and (2) to a defendant in any action in the court who is also sued or expects to be sued in respect of the subject-matter of the action by a third party (*r*).

Conditions of relief.

1332. The conditions of relief are similar to those in the High Court and county courts (*s*).

The application.

1333. The application for relief may be made by the head bailiff or any one of his officers before or after the return of the process, and before or after any action has been brought against him (*a*), and by a defendant at any time after declaration and before plea (*b*). The application is supported by an affidavit, in the case of a defendant, as to the action having been brought or threatened, the adverse claim, and as to his lack of interest, his absence of collusion and his readiness to bring the subject-matter into court or dispose of it as the court may direct (*c*). The head bailiff need not file an affidavit unless he relies upon special circumstances (*d*).

Payment into court.

1334. In interpleader by the head bailiff the goods or chattels seized remain in his possession until the court disposes of the

(*n*) 31 & 32 Vict. c. cxxx.; as to general jurisdiction, see title COURTS, Vol. IX., p. 197.

(*o*) Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), ss. 126—128.

(*p*) R. 150 of Rules of October, 1868, made under the Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. cxxx.).

(*q*) Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 112.

(*r*) *Ibid.*, s. 109.

(*s*) *Ibid.*; and as to these conditions see pp. 592 *et seq.*, 628, *ante*.

(*a*) Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 112.

(*b*) *Ibid.*, s. 109.

(*c*) *Ibid.*

(*d*) This is similar to the High Court practice relating to an affidavit by the sheriff; see pp. 594, 595, *ante*.

matter or otherwise orders, unless the claimant deposits with the bailiff the amount in money for which they were seized, together with the costs and expenses of taking and keeping possession, and such sum as the registrar may fix to answer the costs of and incident to the proceedings (*e*).

Stay of proceedings.

1335. Any action which may have been brought in any superior court or the Court of Common Pleas at Lancaster or in any local or inferior court of record in respect of the claim must be stayed, and the court in which any such action shall be brought may order the party bringing such action to pay the costs of the proceedings after the issue of the summons (*f*). In the case of interpleader by a defendant the registrar may stay the proceedings in the action already brought against the defendant (*g*).

Summary determination by registrar.

1336. There is a power, similar to that in the High Court, of summary determination by the registrar of the adverse claims, or of directing an issue, and, in the case of non-appearance of the claimant, of barring his claim (*h*), and generally the court may make such rules and decisions as appear to be just according to the circumstances of the case (*i*). The costs of the proceedings in interpleader before the registrar are in his discretion (*k*)

Appeal.

1337. In interpleader by a defendant the judgment in any other action ordered to be brought against him or in any issue directed to be tried and the summary decision of the registrar shall be final and conclusive against the parties and all persons claiming by, from, or under them (*l*).

New trial.

The judge himself has power to grant a new trial, and to enter a verdict or non-suit (*m*).

(*e*) Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 112.
(*f*) *Ibid.*
(*g*) *Ibid.*, s. 109.
(*h*) *Ibid.*, as to defendant; R. S. C., Ord. 57, as to bailiff.
(*i*) Salford Hundred Court of Record Act, 1869 (31 & 32 Vict. c. cxxx.), s. 112, as to bailiff; *ibid.*, s. 109, as to defendant.
(*k*) *Ibid.*
(*l*) *Ibid.*, s. 110.
(*m*) *Ibid.*, s. 90; rr. 71—73 (see note (*p*), p. 642, *ante*).

INTERPRETATION OF DOCUMENTS.

See DEEDS AND OTHER INSTRUMENTS; EVIDENCE; WILLS.

INTERPRETATION OF STATUTES.

See STATUTES.

INTERPRETATION OF WILLS.

See WILLS.

INTERREGNUM.

See CONSTITUTIONAL LAW.

INTERROGATORIES.

See DISCOVERY, INSPECTION, AND INTERROGATORIES.

INTERVENTION.

See HUSBAND AND WIFE.

INTESTACY.

See DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

END OF VOL. XVII.

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